SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 51

WILLIAM MILLER, ADMINISTRATOR OF THE ESTATES OF MARCUS ANDLAUER AND ELLANORE ANDLAUER, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

	Original	Print
Proceedings in United States circuit court of appeals, eighth circuit	a	1
Caption (omitted in printing)	d	
Record from district court of the United States, Western Missouri	e	1
Citation and service (omitted in printing)	e	
Caption (omitted in printing)	1	
Record from circuit court of Jackson County	1	1
Petition	1	1
Petition for removal	4	4
Removal bond (omitted in printing)	5	
Notice of filing petition and bond for removal	6	5
Order of removal	7	6
Certificate of clerk to transcript (omitted in printing)	7	
Amended petition	8	6
Plea in abatement and answer to amended petition	16	16
Reply	21	22
Record entries of trial	22	22
Judgment	22	23
Notice of appeal	23	24

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1933

	Original	Print
Petition for appeal	23	24
Assignment of errors	24	25
Order allowing appeal	25	26
Appeal bond (omitted in printing)	26	
Notice of filing præcipe for transcript and election as to printing	27	27
Præcipe for transcript	28	28
Election as to printing	29	28
Order extending time to file bill of exceptions	29	29
Order extending time to file transcript	29	29
Bill of exceptions	29	29
Caption	29	29
Testimony of Harry P. Koehler	30	30
Plaintiff's Exhibit 1—Plat of St. Marys, Kansas.	30	30
Defendant's Exhibits "A" to "G"—Photographs	34	36
Plaintiff's Exhibits 2 to 7—Photographs	36	38
Testimony of Mrs. Agnes Miller	37	39
Miss Ellanore Andlauer	37	40
William H. Miller	38	40
Plaintiff's Exhibit 8—Certified copy of letters of administration, estate of Mark A. Andlauer	39	41
Plaintiff's Exhibit 9—Certified copy of letters of administration, estate of Ellanore Andlauer	40	42
Plaintiff's Exhibit 10—Letters of guardianship, Clement Andlauer et al	41	43
Plaintiff's Exhibit 11—Certified copy of order of Probate Court of Shawnee County, Kansas, reopening and appointing William H. Miller administrator of estate of Mark A. Andlauer	42	45
Plaintiff's Exhibit 12—Certified copy of order of Probate Court of Shawnee County, Kansas, reopening and appointing William H. Miller administrator of estate of Ellanore Andlauer	43	46
Defendant's Exhibit H—Certified copy of final discharge of administrator of estate of Mark Andlauer	44	48
Defendant's Exhibit I—Certified copy of final discharge of administrator of estate of Ellanore Andlauer	46	50
Testimony of Mary Jane Andlauer	48	52
Arthur Nagle	48	52
William H. Miller (recalled)	50	54
Arthur Nagle (recalled)	51	55
Ernest Quigley	53	58
Arthur Nagle (recalled)	54	59
Ralph L. Goold	54	59

	Original	Print
Offer in evidence—Section 130 of revised ordinances of St. Marys, Kansas, 1924	56	61
Defendant's requested instructions to jury	57	62
Defendant's motion for directed verdict	57	62
Order dismissing action	57	63
Order settling bill of exceptions	58	64
Agreement as to bill of exceptions	59	64
Clerk's certificate (omitted in printing)	59	
Appearances of counsel (" " ")	60	
Argument and submission (" " ")	62	
Opinion, Gardner, J.	63	65
Judgment	72	73
Motion for rehearing (omitted in printing)	73	
Order denying rehearing	86	74
Motion for order staying mandate	86	74
Order staying mandate	87	75
Clerk's certificate (omitted in printing)	88	
Order allowing certiorari	89	75

[fol. a-d] [Caption omitted]

[fol. e] Citation in usual form, showing service on Watson, Ess, Groner, Barnett & Whittaker, filed April 11, 1932, omitted in printing.

[fol. 1] [Caption omitted]

IN CIRCUIT COURT OF JACKSON COUNTY

PETITION FOR DAMAGES—Filed Dec. 11, 1929

Plaintiff states that he is the duly appointed and acting Executor and personal representative of the estates of the deceased, Marcus Andlauer and Ella Andlauer, having been duly appointed as such by the proper court of Wyandotte County, Kansas, and having qualified as such.

Plaintiff further states that the deceased persons were husband and wife and left surviving them the following named children: Clem Andlauer, Mary Jane Andlauer and Elanore Andlauer.

Plaintiff further states that the defendant is a corporation organized according to law and that at all times herein mentioned it was engaged as a common carrier of freight and passengers in operating a steam railroad in an eastwardly and westwardly direction through the state of Kansas and through other states of the United States; that at all times herein mentioned the said defendant was engaged in the operation of a line of railway in an eastwardly and westwardly direction between Topeka, Kansas, and St. Marys, Kansas; that at all times herein mentioned there was located to the east of the town or city of St. Marys, Kansas, a college or institution of learning, which, during the school or college year, was attended by more than one thousand (1000) students and that there were a number of professors, attendants and others who were inmates of and attended the said institution. The said college was located less than one-fourth of a mile east of the city limits of said city of St. Marys, Kansas; that on the south side of the said line of railway being operated in said eastwardly and west-
[fol. 2] wardly direction there was an open, public highway,

used by the public travel throughout its entire length and width and that there was at all times herein mentioned a public road, which intersected the said highway and crossed the said railroad track and extended in a northerly and southerly direction; that at all times the said public road so intersecting the said east and westbound highway was used by the parents, relatives and friends of the persons connected with the said college and by the general public for the purpose of crossing the said railroad track in the vicinity of the said college grounds and that the said road so extending north and south and across the said railroad track was, to the knowledge of the said defendant, much used by the general public and by the parents and relatives of the persons attending the said college on Sundays during the college year; that within two years from the date of the filing of this petition, to-wit: on the 11th day of December, 1927, the deceased persons, Marcus Andlauer and Ella Andlauer, were husband and wife, and were riding in an automobile going in a westerly direction on the said public road and highway to the south of the said railroad track and that when the said automobile in which the said deceased persons were riding reached the intersection aforementioned, the said automobile turned to the north, for the purpose of crossing said railroad track and before it had fully crossed the said railroad track, the said automobile was struck and injured by a west-bound train operated by the defendant, and the said Marcus Andlauer and said Ella Andlauer were so injured as a direct result thereof that they died within two years from the date of the filing of this petition and this because of the negligence of the defendant; that defendant was negligent in that it operated its said train in a westwardly direction past the said college through said thickly populated and traveled vicinity and over the said intersecting north-bound public road at a high, dangerous and excessive rate of speed; that the said defendant was negligent in that it failed to sound any warning of the approach of the said train, notwithstanding the said defendant knew, and by the exercise of ordinary care, could have known, and had notice and knowledge, that the said automobile in which the said deceased persons were riding and the said deceased persons were approaching and in a position of peril while turning towards and driving towards

and driving on the said track, in time, by the exercise of ordinary care, in the use of the means at the command of the said defendant, to have avoided the collision and injury to the deceased persons, either by giving warning of the [fol. 3] approach of the said railroad train or by slackening the speed thereof, or by stopping the said train, but that the said defendant, negligently neglected so to do; that the defendant was also negligent in that contrary to a custom theretofore observed by it to slow down its trains when passing the said college and entering the said city of St. Marys, the said defendant negligently omitted to observe and follow the said custom and proceeded as aforesaid at said high, dangerous and excessive rate of speed; that defendant was also negligent in that it failed to ring any bell or sound any whistle when within eighty (80) rods of the said crossing and while approaching the said crossing; that as a result of all of the said acts and other acts of negligence, the said Marcus Andlauer and Ella Andlauer were so injured that they thereafter died and that the estate and the surviving children of the said deceased have thereby been damaged in the sum of Ten Thousand ($10,000.00) Dollars for the death of Marcus Andlauer and Ten Thousand ($10,000.00) Dollars for the death of said Ella Andlauer; that Sections 60-3203 and 60-3204, Revised Statutes of Kansas, Annotated 1923, at all times herein mentioned were in force and effect and are as follows:

"§60-3203. Action for Death by Wrongful Act; Limitation; Damages.—When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

§60-3204. When Action May be Brought by Widow or Next of Kin.—That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section is or has been at the time of his death in any other state, or territory, or

when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

[fol. 4] Wherefore said plaintiff prays the court for a judgment against the said defendant for the sum of Twenty Thousand ($20,000.00) Dollars and costs of suit.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

[File endorsement omitted.]

IN CIRCUIT COURT OF JACKSON COUNTY

PETITION FOR REMOVAL—Filed Jan. 9, 1930.

To the honorable, the judges of the Circuit Court within and for the County of Jackson and State of Missouri:

Your petitioner, Union Pacific Railroad Company, most respectfully shows that it is the defendant in the above entitled action; that the matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000.00); that said suit is of a civil nature and is an action brought by the plaintiff against your petitioner.

Your petitioner further avers that in the above-entitled suit there is a controversy which is wholly between citizens of different states, to-wit, a controversy between your petitioner, Union Pacific Railroad Company, which your petitioner avers was at the time of the commencement of this suit, ever since has been, and still is, a citizen and resident of the State of Utah, and is a corporation organized and existing under and by virtue of the laws of the State of Utah, and the said William Miller, Executor, etc., who your petitioner avers was at the time of the commencement of this suit, ever since has been, and still is, a citizen and resident of the State of Kansas, and that your petitioner was not, at the time of the commencement of this action, nor since has been, and is not now a resident or citizen of the State of Missouri or Kansas.

Your petitioner offers herewith a bond with good and sufficient surety for its entering in said District Court of

the United States, within thirty days from the date of filing of this petition, a certified copy of the record in this suit, and for paying all costs that may be awarded by said District Court, if said District Court should hold that this suit was wrongfully or improperly removed thereto, and it prays this court to proceed no further herein, except to make an order for removal, and to accept said surety and bond, and to cause the record herein to be removed to said [fol. 5] District Court of the United States within and for the Western Division of the Western District of Missouri.

Union Pacific Railroad Company, by Watson, Gage & Ess, by I. N. Watson, Its Attorneys.

Duly sworn to by I. N. Watson. Jurat omitted in printing.

[File endorsement omitted.]

Bond on removal for $500.00, approved and filed Jan. 9, 1930, omitted in printing.

[fol. 6] In Circuit Court of Jackson County

Notice of Filing Petition and Bond for Removal—Filed Jan. 9, 1930

To the above-named plaintiff or Kelly, Buchholz & O'Donnell, his attorneys of record:

Take notice: You are hereby notified that the above-named defendant will on the 10th day of January, 1930, file in the Circuit Court of Jackson County, Missouri, at Kansas City, its petition and bond for removal of the above cause to the United States District Court for the Western Division of the Western District of Missouri; that the same will be presented to the Judge of the Assignment Division of said Circuit Court at nine-thirty A. M. on the [fol. 7] 10th day of January, 1930, for his orders granting the removal of said cause to said United States District Court; and you will govern yourself accordingly.

Union Pacific Railroad Company, by Watson, Gage & Ess, I. N. Watson, Attorneys for Defendant.

Received copy of the above notice this 8th day of January, 1930.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

[File endorsement omitted.]

IN CIRCUIT COURT OF JACKSON COUNTY

ORDER OF REMOVAL—Jan. 10, 1930

Now on this day this cause coming on for hearing upon the petition of the defendant for the removal of this cause to the District Court of the United States and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and has heretofore filed its bond for removal, which said bond is by the Court approved and petition sustained.

It is therefore ordered by the Court that this cause be and the same is hereby removed from this Court within and to the District Court of the United States, in and for the Western Division of the Western District of Missouri, at Kansas City.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 8] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI

AMENDED PETITION FOR DAMAGES—Filed Feb. 28, 1931.

Count I

Plaintiff states that on the 11th day of December, 1927, Ellanore Andfauer died intestate at St. Marys, Pottawatomie County, Kansas, as a result of the wrongful acts of the defendant hereinafter set forth; that at said time the said Ellanore Andlauer was a resident of Shawnee County, Kansas, and a citizen of the State of Kansas; that at the said time the above named plaintiff was a citizen and resident of Wyandotte County, Kansas; that at said time the said deceased was the mother of three minor children, residing in the State of Kansas.

Plaintiff further states that thereafter and on the 16th day of December, 1927, he was appointed administrator of

the estate of said Ellanore Andlauer, by the Probate Court of Shawnee County, Kansas, and that at the same time the said plaintiff was appointed guardian of the minor children of the said deceased, and that during all of the time since said 16th day of December, 1927, the said plaintiff has been the duly appointed and acting guardian of the said minor children and that said minor children have had their home with the plaintiff and he has been acting as the parent and guardian.

Plaintiff further states that thereafter he interviewed counsel for the plaintiff herein and requested that they institute this suit against the said defendant, to recover the sum of Ten Thousand ($10,000.00) Dollars from the said defendant because of its wrongful acts in causing the death of the said deceased, as hereinafter set forth; that through mistake the above named plaintiff was described as Executor of the estate of the said deceased and as having been appointed as such by the Probate Court of Wyandotte County, Kansas; that on the 25th day of February, 1929, the said plaintiff, as administrator of the estate of said deceased, was discharged as administrator and the said administration closed.

Plaintiff further states that on the 25th day of February, 1931, on his attention being called to the said mistake, the said plaintiff appeared in the Probate Court of Shawnee County, Kansas, and filed his petition in the said Probate Court directing its attention to the fact that the said estate was not fully administered and that an administrator should be appointed by the court to collect said sum from the said defendant and look after any and all money due the said estate; that thereupon the said Probate Court of Shawnee County, Kansas, made and entered its order, [fol. 9] which said order is in words and figures, as follows:

"In the Probate Court of Shawnee County, Kansas

No. 9862

In the Matter of the Estate of Ellanore Andlauer, Deceased

Order

Now on this 25th day of February, 1931, comes on for hearing the application of William H. Miller for an order reopening the above estate.

Thereupon the Court Finds that Ellanore Andlauer died on the 11th day of December, 1927, intestate and that her estate was admitted to probate and administered and the estate closed on the 25th day of February, 1929; that it now appears that there is due the sum of ten thousand dollars to the estate from the Union Pacific Railway Company on account of the wrongful death of Ellanore Andlauer.

The Court Further Finds that William H. Miller is a resident of the State of Kansas and a competent, worthy and suitable person to assume the duties of administrator of said estate.

The Court Further Finds that the application to reopen said estate should be granted.

It It Therefore by the Court Ordered and Decreed that the above estate be and the same is hereby reopened.

It Is Further Ordered That William H. Miller be and he is hereby appointed administrator herein and that he execute his administrator's bond in the principal sum of $50.00 with conditions and sureties according to law.

J. F. Kaster, Probate Judge." (Seal.)

And plaintiff says that he is now the duly appointed, qualified and acting administrator of said estate.

That on the 27th day of February, 1931, the said defendant served upon the plaintiff a copy of its Answer and Plea in Abatement to the Amended Petition heretofore herein filed.

Plaintiff further states that the deceased Ellanore Andlauer left surviving her the following named children: Clem Andlauer, Mary Jane Andlauer and Elanore Andlauer.

Plaintiff further states that the defendant is a corporation organized according to law and that at all times herein mentioned it was engaged as a common carrier of freight and passengers in operating a steam railroad in an east- [fol. 10] wardly and westwardly direction through the state of Kansas and through other states of the United States; that at all times herein mentioned the said defendant was engaged in the operation of a line of railway in an easterwardly and westerwardly direction between Topeka, Kansas, and St. Marys, Kansas; that at all times herein mentioned there was located to the east of the town

or city of St. Marys, Kansas, a college or institution of learning, which, during the school or college year, was attended by more than one thousand (1,000) students and that there were a number of professors, attendants and others who were inmates of and attended the said institution. The said college was located less than one-fourth of a mile east of the city limits of said city of St. Marys, Kansas; that on the south side of the said line of railway being operated in said eastwardly and westwardly direction there was an open, public highway, used by the public travel throughout its entire length and width and that there was at all times herein mentioned a public road, which intersected the said highway and crossed the said railroad track and extended in a northerly and southerly direction; that at all times the said public road so intersecting the said east and west-bound highway was used by the parents, relatives and friends of the persons connected with the said college and by the general public for the purpose of crossing the said railroad track in the vicinity of the said college grounds and that the said road so extending north and south and across the said railroad track was, to the knowledge of the said defendant, much used by the general public and by the parents and relatives of the persons attending the said college on Sundays during the college year; that within two years from the date of the instituting of this action, to-wit: on the 11th day of December, 1927, the deceased was riding in an automobile going in a westerly direction on the said public road and highway to the south of the said railroad track and that when the said automobile in which the said deceased was riding reached the intersection aforementioned, the said automobile turned to the north, for the purpose of crossing said railroad track and before it had fully crossed the said railroad track, the said automobile was struck and injured by a west-bound train operated by the defendant, and the said Ellanore Andlauer was so injured as a direct result thereof that she died within two years from the date of the institution of this action and this because of the negligence of the defendant; that defendant was negligent in that it operated its said train in a westwardly direction past the said college through said thickly populated and traveled vicinity and over the said intersecting north-bound public road at a high, dangerous and excessive rate

[fol. 11] of speed; that the said defendant was negligent in that it failed to sound any warning of the approach of the said train, notwithstanding the said defendant knew, and by the exercise of ordinary care, could have known, and had notice and knowledge, that the said automobile in which the said deceased was riding and the said deceased was approaching and in a position of peril while turning towards and moving towards and moving on the said track, in time, by the exercise of ordinary care, in the use of the means at the command of the said defendant, to have avoided the collision and injury to the deceased, either by giving warning of the approach of the said railroad train or by slackening the speed thereof, or by stopping the said train, but that the said defendant, negligently neglected so to do; that the defendant was also negligent in that contrary to a custom theretofore observed by it to slow down its trains when passing the said college and entering the said city of St. Marys, the said defendant negligently omitted to observe and follow the said custom and proceeded as aforesaid at said high, dangerous and excessive rate of speed; that the defendant was also negligent in that it failed to ring any bell or sound any whistle when within eighty (80) rods of the said crossing and while approaching the said crossing; that as a result of all of the said acts and other acts of negligence, the said Ellanore Andlauer was so injured that she thereafter died and that the estate and the surviving children of the said deceased have thereby been damaged in the sum of Ten Thousand ($10,000.00) Dollars; that Sections 60-3203 and 60-3204, Revised Statutes of Kansas, Annotated 1923, at all times herein mentioned were in force and effect, and are as follows:

"§60-3203. Action for Death by Wrongful Act; Limitation; Damages.—When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distrib-

uted in the same manner as personal property of the deceased.

§60-3204. When Action May be Brought by Widow or Next of Kin.—That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal [fol. 12] representative is or has been appointed, the action provided in said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

Wherefore said plaintiff prays the court for a judgment against the said defendant for the sum of Ten Thousand ($10,000.00) Dollars and costs of suit.

Count II

And for a second cause of action plaintiff states that on the 11th day of December, 1927, Marcus Andlauer died intestate at St. Marys, Pottawatomie County, Kansas, as a result of the wrongful acts of the defendant hereinafter set forth; that at said time the said Marcus Andlauer was a resident of Shawnee County, Kansas, and a citizen of the State of Kansas; that at the said time the above named plaintiff was a citizen and resident of Wyandotte County, Kansas; that at said time the said deceased was the father of three minor children, residing in the State of Kansas.

Plaintiff further states that thereafter and on the 16th day of December, 1927, he was appointed administrator of the estate of said Marcus Andlauer, by the Probate Court of Shawnee County, Kansas, and that at the same time the said plaintiff was appointed guardian of the minor children of the said deceased, and that during all of the time since said 16th day of December, 1927, the said plaintiff has been the duly appointed and acting guardian of the said minor children and that said minor children have had their home with the plaintiff and he has been acting as the parent and guardian.

Plaintiff further states that thereafter he interviewed counsel for the plaintiff herein and requested that they institute this suit against the said defendant, to recover the

sum of Ten Thousand ($10,000.00) Dollars from the said defendant because of its wrongful acts in causing the death of the said deceased, as hereinafter set forth; that through mistake the above named plaintiff was described as Executor of the estate of the said deceased and as having been appointed as such by the Probate Court of Wyandotte County, Kansas; that on the 25th day of February, 1929, the said plaintiff, as administrator of the estate of said deceased, was discharged as administrator and the said administration closed.

Plaintiff further states that on the 25th day of February, 1931, on his attention being called to the said mistake, the said plaintiff appeared in the Probate Court of Shawnee County, Kansas, and filed his petition in the said Probate Court directing its attention to the fact that the said estate was not fully administered and that an ad-
[fol. 13] ministrator should be appointed by the court to collect said sum from the said defendant and look after any and all money due the said estate; that thereupon the said Probate Court of Shawnee County, Kansas, made and entered its order, which said order is in words and figures, as follows:

"IN THE PROBATE COURT OF SHAWNEE COUNTY, KANSAS

No. 9868

In the Matter of the Estate of MARK A. ANDLAUER, Deceased

ORDER

Now on this 25th day of February, 1931, comes on for hearing the application of William H. Miller for an order reopening the above estate.

Thereupon the Court Finds that Mark A. Andlauer died on the 11th day of December, 1927, intestate and that his estate was admitted to probate and administered and the estate closed on the 25th day of February, 1929; that it now appears that there is due the sum of Ten Thousand dollars to the estate from the Union Pacific Railway Company on account of the wrongful death of Mark A. Andlauer.

The Court Further Finds that William H. Miller is a resident of the State of Kansas and a competent, worthy and suitable person to assume the duties of administrator of said estate.

The Court Further Finds that the application to reopen said estate should be granted.

It Is Therefore by the Court Ordered and Decreed that the above estate be and the same is hereby reopened.

It Is Further Ordered that William H. Miller be and he is hereby appointed administrator herein and that he execute his administrator's bond in the principal sum of $50.00 with conditions and sureties according to law.

J. F. Kaster, Probate Judge." (Seal.)

And plaintiff says that he is now the duly appointed, qualified and acting administrator of said estate.

That on the 27th day of February, 1931, the said defendant served upon the plaintiff a copy of its Answer and Plea in Abatement to the Amended Petition heretofore herein filed.

Plaintiff further states that the deceased Marcus Andlauer left surviving him the following named children: Clem Andlauer, Mary Jane Andlauer and Elanore Andlauer.

Plaintiff further states that the defendant is a corporation organized according to law and that at all times herein [fol. 14] mentioned it was engaged as a common carrier of freight and passengers in operating a steam railroad in an eastwardly and westwardly direction through the state of Kansas and through other states of the United States; that at all times herein mentioned the said defendant was engaged in the operation of a line of railway in an eastwardly and westwardly direction between Topeka, Kansas, and St. Marys, Kansas; that at all times herein mentioned there was located to the east of the town or city of St. Marys, Kansas, a college or institution of learning, which, during the sc. ol or college year, was attended by more than one thousand (1,000) students and that there were a number of professors, attendants and others who were inmates of and attended the said institution. The said college was located less than one-fourth of a mile east of the city limits of said city of St. Marys, Kansas; that on the south side of the said line of railway being operated in

said eastwardly and westwardly direction there was an open, public highway, used by the public travel throughout its entire length and width and that there was at all times herein mentioned a public road, which intersected the said highway and crossed the said railroad track and extended in a northerly and southerly direction; that at all times the said public road so intersecting the said east and west-bound highway was used by the parents, relatives and friends of the persons connected with the said college and by the general public for the purpose of crossing the said railroad track in the vicinity of the said college grounds and that the said road so extending north and south and across the said railroad track was, to the knowledge of the said defendant, much used by the general public and by the parents and relatives of the persons attending the said college on Sundays during the college year; that within two years from the date of the filing of this petition, to-wit: on the 11th day of December, 1927, the deceased was riding in an automobile going in a westerly direction on the said public road and highway to the south of the said railroad track and that when the said automobile in which the said deceased was riding reached the intersection aforementioned, the said automobile turned to the north, for the purpose of crossing said railroad track and before it had fully crossed the said railroad track, the said automobile was struck and injured by a west-bound train operated by the defendant, and the said Marcus Andlauer was so injured as a direct result thereof that he died within two years from the date of the instituting of this action and this because of the negligence of the defendant; that defendant was negligent in that it operated its said train in a westwardly direction past the said college through said [fol. 15] thickly populated and traveled vicinity and over the said intersecting north-bound public road at a high, dangerous and excessive rate of speed; that the said defendant was negligent in that it failed to sound any warning of the approach of the said train, notwithstanding the said defendant knew, and by the exercise of ordinary care, could have known, and had notice and knowledge, that the said automobile in which the said deceased was riding and the said deceased was approaching and in a position of peril while turning towards and moving towards and moving on the said track, in time, by the exercise of ordinary care, in

the use of the means at the command of the said defendant, to have avoided the collision and injury to the deceased, either by giving warning of the approach of the said railroad train or by slackening the speed thereof, or by stopping the said train, but that the said defendant, negligently neglected so to do; that the defendant was also negligent in that contrary to a custom theretofore observed by it to slow down its trains when passing the said college and entering the said city of St. Marys, the said defendant negligently omitted to observe and follow the said custom and proceeded as aforesaid at said high, dangerous and excessive rate of speed; that defendant was also negligent in that it failed to ring any bell or sound any whistle when within eighty (80) rods of the said crossing and while approaching the said crossing; that as a result of all of the said acts and other acts of negligence, the said Marcus Andlauer was so injured that he thereafter died and that the estate and the surviving children of the said deceased have thereby been damaged in the sum of Ten Thousand ($10,000.00) Dollars; that Section 60-3203 and 60-3204, Revised Statutes of Kansas, Annotated 1923, at all times herein mentioned were in force and effect, and are as follows:

"§60-3203. Action for Death by Wrongful Act; Limitation; Damages.—When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

[fol. 16] §60-3204. When Action May be Brought by Widow or Next of Kin.—That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section may be brought by the widow, or

where there is no widow, by the next of kin of such deceased."

Wherefore said plaintiff prays the court for a judgment against the said defendant for the sum of Ten Thousand ($10,000.00) Dollars and costs of suit.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S PLEA IN ABATEMENT AND ANSWER TO PLAINTIFF'S AMENDED MOTION—Filed Dec. 23, 1931

To Count One

I

Defendant by way of plea in abatement to Count One of plaintiff's amended petition states that the plaintiff, William Miller, at the time of the institution of this suit was not the executor of the estate of Ella Andlauer, but was appointed executor of the estate of the said Ella Andlauer after the institution of this suit, and at the time this suit was filed the said William Miller had no right to bring said suit and was not interested in the subject matter thereof, and the alleged cause of action set out in Count One of plaintiff's amended petition had not accrued to the said William Miller at the time this suit was instituted and by reason of the above-stated facts, this suit was prematurely brought.

Wherefore, defendant prays that the action on Count One be abated and dismissed.

[fol. 17] II

Defendant states that the cause of action, if any, asserted in Count One of plaintiff's amended petition is barred by the Statute of Limitations of the State of Kansas, namely, Section 60-3203 R. S. Kansas 1923, because, this action was not instituted within two years from the alleged date of the accrual thereof; that the plaintiff could

have had no cause of action until he was appointed executor of the estate of Ella Andlauer, deceased, and that he was not appointed until after this suit had been instituted and was not so appointed until more than two years after the date of the accrual of the alleged cause of action contained in Count One of the petition.

III

Defendant denies that Ella Andlauer was riding on a public highway or upon a highway used by the public, or that she was in any manner struck or injured by riding upon or using or otherwise being upon the public highway, and defendant denies that Ella Andlauer was injured or came to her death by reason of any negligence of the defendant, and denies that defendant operated its train at either a high or dangerous or excessive rate of speed, and denies that it failed to sound a warning of the approach of its train, and denies that defendant knew, and denies that by the exercise of ordinary care it could have known, and denies that it had notice or knowledge, that the automobile in which Ella Andlauer was riding was approaching or in a position of peril in time by the exercise of ordinary care, by use of the means at the command of the defendant to have avoided collision or injury to Ella Andlauer, and denies that defendant knew, or by the exercise of ordinary care could have known that the said Ella Andlauer was in a position of peril or coming into a position of peril in time to have given a warning of the approach of defendant's train or to slacken the speed thereof, or to stop the train in time to have avoided collision or injury. Defendant denies that there was any custom for the defendant to slow down its trains while passing the college referred to in the petition, or while entering the City of St. Marys, and denies that the said Ella Andlauer was injured by reason of the failure to observe any custom to slow down and denies that there was a failure to observe any custom to slow down, and denies that either the said Ella Andlauer or the drive of said automobile relied upon any custom to slow down at the said place. Defendant denies that it negligently or otherwise failed to ring a bell, and [fol. 18] denies that it negligently or otherwise failed to

sound a whistle, and denies that it failed to give such warnings when with eighty (80) rods of the place where Ella Andlauer was struck, and denies that Ella Andlauer was injured or come to her death by reason of any failure to sound a bell or whistle.

IV

Defendant states that Ella Andlauer was guilty of negligence which directly contributed to her injuries and to her death in this: She was riding in an automobile in the daytime and said automobile was being then driven by her husband; said automobile was traveling parallel to the railroad track upon which defendant's train was running; that said railroad track was a straight right-of-way and the said Ella Andlauer knew that her husband intended to drive said automobile across the said railroad track, and the said Ella Andlauer, by the exercise of ordinary care, could have seen the approach of defendant's train for more than one mile before said train reached said crossing. The said Ella Andlauer, while riding in said automobile, saw, or by the exercise of ordinary care could and would have seen, said railroad train then operated by defendant approaching upon said track, in time to have caused said vehicle in which she was riding to have been stopped, and by the exercise of ordinary care she could thereby have avoided a collision with defendant's train; that the said Ella Andlauer either saw said train, or failed to look for said train before going upon the track in front of the approaching train in time so that she could have notified her husband, who was driving said automobile, of the approach of said train before he had driven said automobile upon the track in front of said train and in time to have avoided collision, and by the exercise of ordinary care the said Ella Andlauer could have avoided such collision.

Neither the said Ella Andlauer nor her husband, Marcus Andlauer, stopped said automobile in which they were riding before going upon the track in front of said approaching train, although due and proper warning by whistle and bell were given of the approach of said train, and the said Ella Andlauer heard, or by the exercise of ordinary care she could have heard said warning signals, and she knew, or by the exercise of ordinary care could and would have

known of the approach of said train. It was the duty of the said Ella Andlauer to exercise due care for her own safety against the possibility of collision with said train, and the railroad right-of-way was within her plain sight and it was obvious that it was a railroad right-of-way, and [fol. 19] the said Ella Andlauer knew, or by the exercise of ordinary care could and should have known that her husband intended to drive the automobile in which she was riding upon a railroad track where the approach of trains should be expected, and she did nothing to prevent said car from being driven upon said railroad track in front of the approaching train. The above-stated negligence of the said Ella Andlauer directly contributed to her injuries and to her death.

Wherefore, having fully answered the First Count of the amended petition, defendant prays to be discharged with its costs.

To Count Two

I

Defendant by way of plea in abatement to Count Two of plaintiff's amended petition states that the plaintiff, William Miller, at the time of the institution of this suit was not the executor of the estate of Marcus Andlauer, but was appointed executor of the estate of the said Marcus Andlauer after the institution of this suit, and at the time this suit was filed the said William Miller had no right to bring said suit and was not interested in the subject matter thereof, and the alleged cause of action set out in Count Two of plaintiff's amended petition had not accrued to the said William Miller at the time this suit was instituted, and by reason of the above-stated facts, this suit was prematurely brought.

Wherefore, defendant prays that this action on Count Two be abated and dismissed.

II

Defendant states that the cause of action, if any, asserted in Count Two of plaintiff's amended petition is barred by the Statute of Limitations of the State of Kansas, namely Section 60-3203 R. S. Kansas 1923, because

this action was not instituted within two years from the alleged date of the accrual thereof; that the plaintiff could have had no cause of action until he was appointed executor of the estate of Marcus Andlauer, deceased, and that he was not appointed until after this suit had been instituted and more than two years after the date of the accrual of the alleged cause of action contained in Count Two of the petition.

III

Defendant denies that Marcus Andlauer was riding on a public highway or upon a highway used by the public, or [fol. 20] that he was in any manner struck or injured by riding upon or using or otherwise being upon the public highway, and defendant denies that Marcus Andlauer was injured or that he came to his death by reason of any negligence of the defendant, and denies that defendant operated its train at either a high or dangerous or excessive rate of speed, and denies that it failed to sound a warning of the approach of its train, and denies that defendant knew, and denies that by the exercise of ordinary care it could have known, and denies that it had notice and knowledge that the automobile, in which Marcus Andlauer was riding, was approaching, or in a position of peril in time by the exercise of ordinary care, by the use of the means at the command of the defendant to have avoided collision or injury to Marcus Andlauer, and denies that defendant knew, or that by the exercise of ordinary care it could have known that the said Marcus Andlauer was in a position of peril, or coming into a position of peril, in time to have given a warning of the approach of defendant's train or to slacken the speed thereof, or to stop the train in time to have avoided collision or injury. Defendant denies that there was a custom for the defendant to slow down its trains while passing the college referred to in the petition, or while entering the City of St. Marys, and denies that the said Marcus Andlauer either knew of or relied upon any such custom, and denies that the said Marcus Andlauer was injured by reason of the failure to observe any custom to slow down, and denies that there was a failure to observe any custom to slow down. Defendant denies that it negligently or otherwise failed to ring a bell and denies that it negligently or

otherwise failed to sound a whistle, and denies that it failed to give such warnings when within eighty (80) rods of the place where Marcus Andlauer was struck, and denies that Marcus Andlauer was injured, or came to his death by reason of any failure to sound a bell or whistle.

IV

Defendant states that Marcus Andlauer was guilty of negligence which directly contributed to his injuries, and to his death in this: He was riding in an automobile in the daytime, which said automobile was being driven by himself; said automobile was traveling parallel to the railroad track upon which defendant's train was running; that said railroad track was a straight right-of-way and the said Marcus Andlauer intended to drive said automobile across the said railroad track, and the said Marcus Andlauer, by the exercise of ordinary care could and would have seen the approach of defendant's train for more than one mile [fol. 21] before said train reached said crossing. The said Marcus Andlauer, while driving said automobile, saw, or by the exercise of ordinary care, could and would have seen said railroad train then operated by defendant approaching upon said track in time to have caused said vehicle which he was driving to stop, and by the exercise of ordinary care, he could thereby have avoided a collision with defendant's train; that the said Marcus Andlauer either saw said train, or failed to look for said train before going upon the track in front of the approaching train, in time so that he could have stopped said automobile and avoided said collision, and by the exercise of ordinary care the said Marcus Andlauer could have avoided such collision.

The said Marcus Andlauer did not stop said automobile which he was driving before going upon the track in front of the approaching train, although due and proper warning by whistle and bell were given of the approach of said train, and the said Marcus Andlauer heard, or by the exercise of ordinary care he could have heard, said warning signals, and he knew, or by the exercise of ordinary care could and would have known of the approach of said train. It was the duty of the said Marcus Andlauer to exercise due care for his own safety against the possibility of collision with said train, and the railroad right-of-way

was within his plain sight, and it was obvious that it was a railroad right-of-way, and the said Marcus Andlauer intentionally drove his said automobile upon a railroad track where the approach of trains should be expected, and he did nothing to prevent said car from going upon said railroad track in front of the approaching train. The above-stated negligence of the said Marcus Andlauer directly contributed to his injuries and his death.

Wherefore, having fully answered the Second Count of the amended petition, defendant prays to be discharged with its costs.

T. M. Lillard, Watson, Gage, Ess, Groner & Barnett, by Paul Barnett, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

Reply—Filed Feb. 9, 1932

Reply to Count I

I

Now comes plaintiff and for reply to the defendant's Plea in Abatement and Answer to Count I denies each [fol. 22] and every allegation in Defendant's Plea in Abatement and in Defendant's Answer to Count I contained.

Reply to Count II

II

Now comes plaintiff and for reply to the defendant's Plea in Abatement and Answer to Count II denies each and every allegation in Defendant's Plea in Abatement and Answer to Count II contained.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

Record Entry—Jury Empanelled; Trial—Mch. 9, 1932

This day this cause coming on regularly to be heard, the parties appear by their attorneys of record and an-

nounce ready for trial; defendant's demurrer is heard by the court and overruled; a jury is ordered and comes as follows: Roy Warnick, Carl D. Brooks, A. S. Harrison, T. C. Hulse, James E. Winchell, Charles T. Brown, Ira Cass, W. O. Clark, L. W. Garrison, E. H. Galladay, L. E. Holding and K. V. Johnson who are duly chosen and sworn to try this cause. Opening statements are made and plaintiff introduces testimony, and further proceedings are postponed until Thursday, March 10, 1932, at ten o'clock A. M.

RECORD ENTRY—TRIAL—Mch. 10, 1932

Now the parties herein appear by their attorneys, the jury being in court the trial is resumed and plaintiff introduces testimony and rests. Defendant's counsel files request for an instructed verdict on both counts of the petition which is submitted to the court, heard and taken under advisement until tomorrow morning. Further hearing is postponed until Friday March 11 at ten o'clock A. M.

IN UNITED STATES DISTRICT COURT

JUDGMENT—March 11, 1932

Come now again the parties hereto by their attorneys and the jury being in court the trial of this cause is resumed, the court renders his opinion on motion for directed verdict. The defendant's motion in the alternative is sus-
[fol. 23] tained and the cause of action respectively set forth in counts one and two of the petition are dismissed on the merits with prejudice and with costs to the defendant, to be taxed by the clerk and the plaintiff is allowed an exception to the ruling of the court. The jury is excused from further consideration of this cause. The plaintiff to pay the costs herein.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 11, 1932

To whom it may concern and to the above-named defendant or Watson, Ess, Groner, Barnett & Whittaker, its attorneys of record:

You will please take notice that plaintiff, William Miller, Administrator of the estates of Marcus Andlauer, deceased, and Ellanore Andlauer, deceased, feeling aggrieved by the judgment rendered and entered in the above entitled cause, on the 11th day of March, 1932, does appeal from said judgment to the United States Circuit Court of Appeals for the 8th Circuit, a copy of plaintiff's application for appeal is hereto attached.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

Service of a true copy of within and foregoing notice of appeal and also copy of application for appeal acknowledged and accepted at Kansas City, Missouri, this 11th day of April, 1932.

Watson, Ess, Groner, Barnett & Whittaker, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed April 11, 1932

The above named plaintiff, William Miller, Administrator of the estates of Marcus Andlauer, deceased, and Ellanore Andlauer, deceased, feeling aggrieved by the judgments, orders, rulings and decisions of the court in the above entitled cause, made and entered on the 11th day of March, 1932, does hereby appeal from said judgments, orders and rulings and decisions, dismissing plaintiff's case, and each count thereof, upon the merits, with prejudice, to the United States Circuit Court of Appeals for the 8th Circuit, for the reasons set forth in the assignments of error and said plaintiff prays that his appeal be

allowed and that citation be issued, as provided by law [fol. 24] and that a transcript of the record, proceedings and documents on which said judgments were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 8th Circuit, under the rules of said court in cases made and provided.

Plaintiff presents herewith his appeal bond in the sum of Five Hundred ($500.00) Dollars, that being the amount fixed by the court as the appeal bond herein, and prays that said bond may be approved.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed April 11, 1932

Now comes William Miller, the Administrator of the estates of Marcus Andlauer and Ellanore Andlauer, deceased, plaintiff herein, and says that the judgment and order entered herein on the 11th day of March, 1932, in the above entitled cause, is erroneous and against the just rights of the said plaintiff, for the following reasons:

(1) Because the court erred in sustaining, over plaintiff's objections and exceptions, defendant's Motion to Dismiss this cause, with prejudice.

(2) Because the court erred in holding over plaintiff's objections and exceptions that as a matter of law the defendant was entitled to judgment in its favor upon the pleadings and the evidence in said cause.

(3) Because the court erred in holding that William Miller, Administrator, was not entitled to recover of and from the defendant because of its wrongful acts in causing the death of Ellanore Andlauer, deceased.

(4) Because the court erred in holding that William Miller, Administrator, was not entitled to recover of and from the defendant because of its wrongful acts in causing the death of Marcus Andlauer, deceased.

(5) Because the court erred in sustaining the defendant's Motion for a Directed Verdict.

(6) Because the court erred at the close of the evidence in rendering a judgment that the cause be dismissed with prejudice.

[fol. 25] (7) Because the court erred in permitting an examination of witnesses by the defendant on matters concerning which they were not examined by the plaintiff.

Wherefore plaintiff, because of each and all of the errors as herein specified, prays that the judgments and orders entered against him herein on the 11th day of March, 1932, be reversed at defendant's costs.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed April 11, 1932

Now on this 11th day of April, 1932, there is presented to this court the application of plaintiff, William Miller, Administrator of the estates of Marcus Andlauer, deceased, and Ellanore Andlauer, deceased, praying for the allowance of an appeal herein to the United States Circuit Court of Appeals for the 8th Circuit and it appearing to the court that there has been filed with said application for appeal an assignment of error, setting forth and apart, each error intended to be urged and it further appearing that a good and sufficient bond in the sum of Five Hundred ($500.00) Dollars, as an appeal bond, this being the amount of the appeal bond fixed by the court, it is therefore

Ordered by the court that an appeal be, and the same is, hereby allowed said plaintiff, as provided by law to the United States Circuit Court of Appeals for the 8th Circuit to review the proceedings and judgment in this case, whereby a judgment was rendered in favor of the defendant against plaintiff on the 11th day of March, 1932; that citation issue, as provided by law; that a full transcript of the proceedings be by the clerk of said court presented and filed with the clerk of the United States Circuit Court of Appeals for the 8th Circuit, and the appeal bond herein tendered is hereby approved.

It is further ordered that the plaintiff be, and he is hereby, given until on or before sixty (60) days from this date in which to file a bill of exceptions herein.

[fol. 26] Done at Kansas City, Missouri, this 11th day of April, 1932.

Merrill E. Otis, District Judge.

Bond on appeal for $500.00, approved and filed April 11, 1932, omitted in printing.

[fol. 27] In United States District Court

Notice of Filing Præcipe and Election as to Printing—Filed April 11, 1932

To Union Pacific Railroad Company, a corporation, and Watson, Ess, Groner, Barnett and Whittaker, its attorneys of record:

Please take notice that on the 11th day of April, 1932, the undersigned filed with the Clerk of this Court a præcipe for the record to be transmitted to the United States Circuit Court of Appeals, Eighth Circuit, on appeal sued out in the above cause, copy of which præcipe is herewith served on you.

You are further notified that on the 11th day of April, 1932, the undersigned filed with the Clerk of this Court an election as to printing, designating the Clerk of the District Court of the United States for the Western Division of the Western District of Missouri, at Kansas City, as the person under whose supervision the printing on the appeal of the above cause shall be done, a copy of which election as to printing is herewith served on you.

Dated this 11th day of April, 1932.

Kelly, Buchholz & O'Donnell, Attorneys for Appellant.

[fol. 28] Service of the within election as to printing and copy of præcipe are hereby acknowledged this 11th day of April, 1932.

Watson, Ess, Groner, Barnett & Whittaker, Attorneys for Appellee.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed April 11, 1932.

To the clerk of the above court:

You will please include in the record herein, the following portions of the record:

1st. All record entries.
2d. Transcript of the cause as removed from the Circuit Court of Jackson County, Missouri.
3d. Plaintiff's amended petition, filed February 28, 1931.
4th. Defendant's answer to said amended petition.
5th. Plaintiff's reply.
6th. Order, judgment and decree, dismissing plaintiff's case on its merits, with prejudice, and with costs to the defendant.
7th. Plaintiff's application for appeal.
8th. Plaintiff's notice of appeal with acknowledgment of service.
9th. Plaintiff's assignments of error.
10th. Bond for appeal.
11th. Order allowing appeal.
12th. Citation with service.
13th. Bill of exceptions.
14th. Election to have transcript printed by Clerk of the District Court.
15th. This præcipe.
16th. Certificate of clerk authenticating the record.

Kelly, Buchholz & O'Donnell, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING—Filed April 11, 1932

The plaintiff above named hereby elects to have the Clerk of the Court of the District Court of the United States for the Western Division of the Western District

of Missouri, at Kansas City, supervise the printing herein on appeal of this cause.

Kelly, Buchholz & O'Donnell, Attorneys for Appellant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS—Filed May 19, 1932

Now on this day for good cause shown the time in which to file the bill of exceptions herein is extended 40 days from this date.

May 19, 1932.

Albert L. Reeves, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed May 19, 1932

Now on this day for good cause shown, the time in which to file the transcript of the record in the United States Circuit Court of Appeals is hereby enlarged 40 days from this date.

May 19, 1932.

Albert L. Reeves, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

BILL OF EXCEPTIONS—Filed May 27, 1932

The above entitled action came duly on for hearing before the Court, the Honorable Andrew Miller, Judge, sitting by assignment, and a jury empanelled, at Kansas

City, Missouri, on the 9th day of March, 1932, the plaintiff appearing by his attorneys, Messrs. Kelly, Buchholz & O'Donnell, of Kansas City, Missouri, and the defendant appearing by its attorneys, Messrs. Lillard, Hurd & Eidson, [fol. 30] of Topeka, Kansas, and Messrs. Watson, Ess, Groner, Barnett & Whittaker, of Kansas City, Missouri. Whereupon the following proceedings were had:

"By Mr. Whittaker: Now if the Court please, defendant objects to the introduction of any evidence in this case for the reason that the petition upon which the case is being tried wholly fails to state any cause of action or facts sufficient to constitute a cause of action, and more particularly because this action is, and upon the face of the petition it appears to be, prematurely brought.

The Court: Objection overruled.

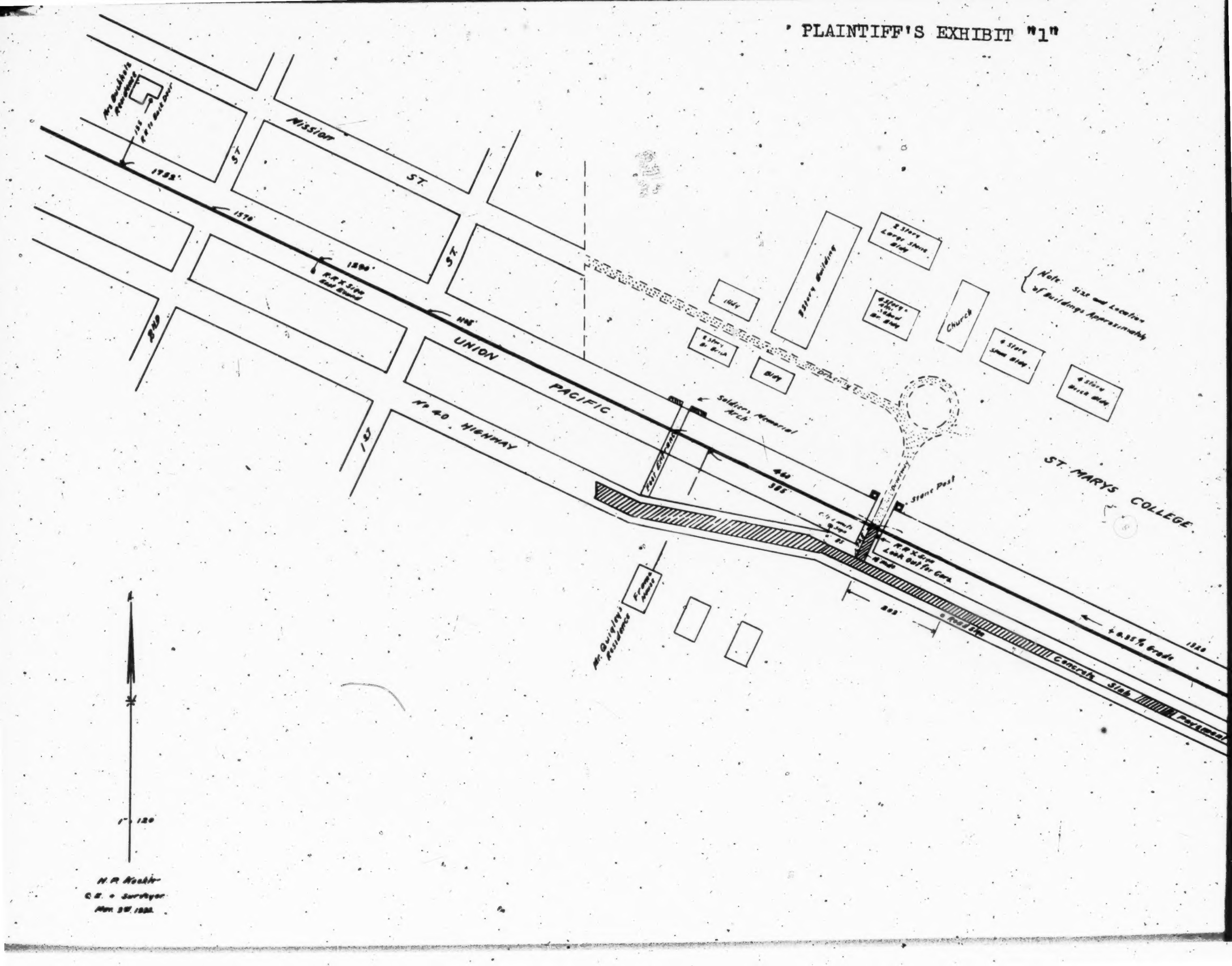
Mr. Whittaker: Exception."

Thereupon HARRY P. KOEHLER, being called as a witness, testified that he is a civil engineer and surveyor in Kansas City, Missouri, in which business he has been engaged for twenty-two years; that he made a plat of St. Marys, Kansas, showing U. S. Highway No. 40 and a part of the Union Pacific railroad tracks, showing the entrance to and street crossings in the vicinity of St. Marys College.

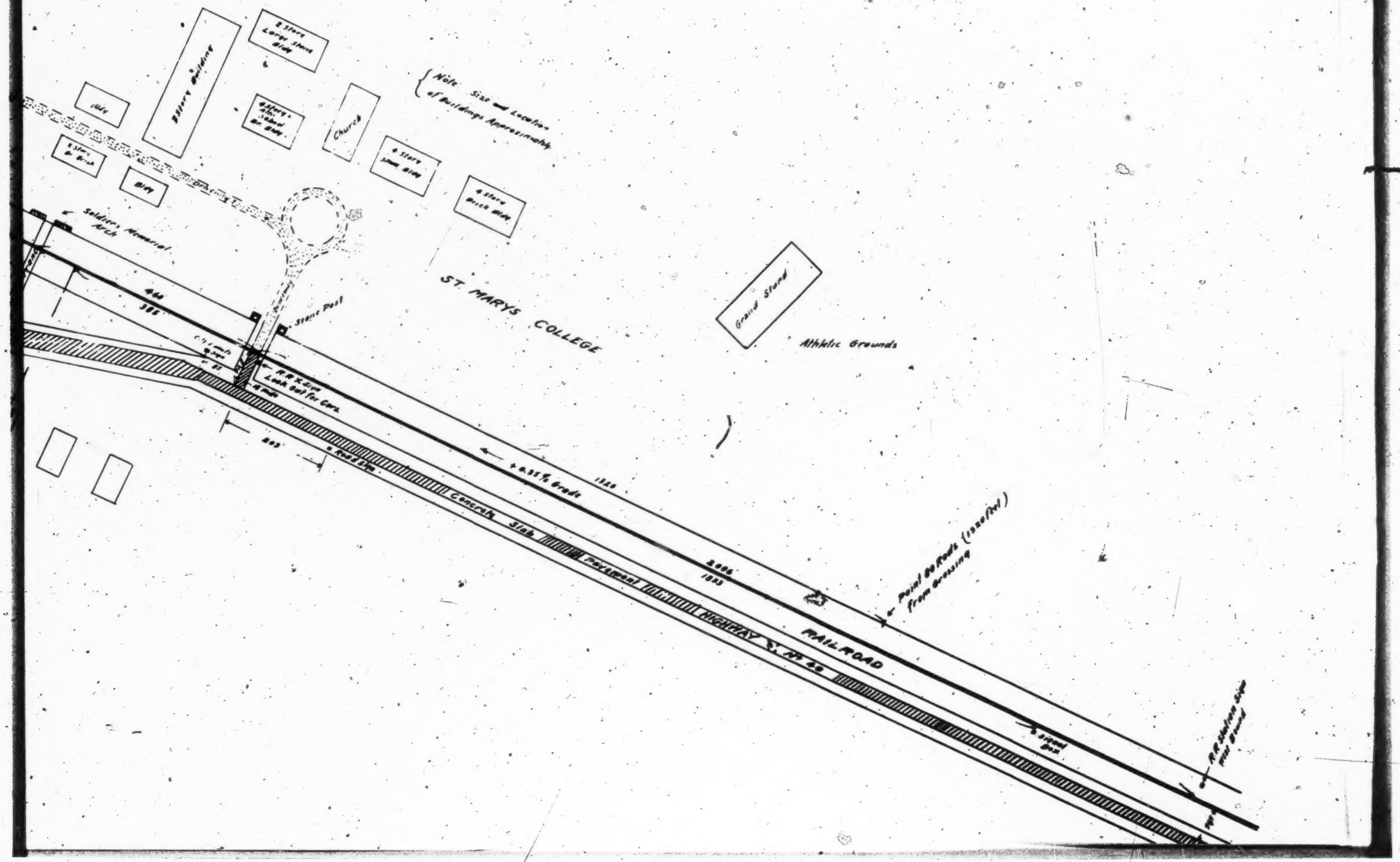
Here the plaintiff introduced and offered in evidence the plat marked "Exhibit 1," made by Mr. Kohler, which is as follows:

(Here follows exhibit, side folio 30a.)

PLAINTIFF'S EXHIBIT "1"



PLAINTIFF'S EXHIBIT "1"



[fol. 31] The witness personally made a survey on March 1, 1932, and made the plat the next day. The measurements were made with a 100-foot steel tape. The witness then indicated on the plat a roadway running northerly from U. S. 40 Highway across the railroad track and into the grounds of St. Marys College. The distance from the north edge of the slab on U. S. 40 Highway to the south rail of the railroad track is 71½ feet. The railroad track is a standard gauge, the rails being practically five feet apart. There is a driveway running through the grounds and connects into Mission Street at the point indicated on the plat. Right at the crossing 17 feet south of the rail and one foot east of the concrete slab on the roadway running into the College grounds was the post that was known as the railroad crossing sign and had on it "Look out for the cars," painted white with black letters. The witness indicated on the plat the College buildings and the church. They were not drawn to scale but their location and dimensions were estimated. The distance from the rail to the slab and other distances were by actual measurements. A whistling post was located 2006 feet to the east of the center of the driveway entering the College grounds, on the north side of the railroad track. A whistling post was located 1290 feet west of the center of the entrance to the College grounds on the south side of the railroad track. The distance from the center of the driveway to the mark opposite the Buchholz residence is 1752 feet and it is 155 feet from the north rail of the track to the back door of the Buchholz house. To the south of public Highway No. 40 there are three houses and the witness marked the third house as being Mr. Quigley's residence. A road sign was located on the south side of Highway No. 40, 203 feet east of the center of the roadway that runs north over the track and into the College grounds.

"Q. Now do you notice, have you got any sign there with reference to the city limits?

A. Yes, there is a sign indicated here 85 feet from that slab.

Mr. Whittaker: If the Court please, we object to this evidence upon the ground that it is not the best evidence or the manner in which to prove the location of city limits.

The Court: If that is important, of course, this witness has not shown himself competent to testify.

Q. Did you see any sign such as the whistling posts were on the railroad track, any sign that you have reproduced here?

A. Yes, sir.

Q. And what was that sign, describe what it was?

A. It was the city limit sign.

Q. What was on it?

[fol. 32] A. I just forget the exact words on it but it was a sign indicating the city limits.

Mr. Whittaker: Now, if the Court please, we move the answer of the witness be stricken out for the reason——

The Court: The latter part of it will be stricken out, that part of it about the city limits.

Mr. O'Donnell: Exception.

Q. Did you put in your notes just what was on that sign or do you recall that?

A. I did not.

Q. Did you put something on here to indicate the thing you refer to as the city limit sign?

A. Yes, sir.

Q. Now how far was that thing west of this crossing?

A. That would be east of it.

Mr. Whittaker: We object to it, if the Court please, as assuming that it is the city limit and that matter would not be susceptible to proof of this nature.

The Court: I do not understand that this question asked for anything except the distance to this particular object that he has described. Overruled.

Mr. Whittaker: Exception.

A. That distance is 85 feet from this sign to the East edge of the concrete paving running in that entrance."

The witness described the sign referred to as being 85 feet west of the entrance to the College.

"Q. Now, will you tell the court and jury what that mark was 85 feet west, as you recall it, what was it?

A. Well, it was a sign there.

Q. Well, what was it, wood or iron, or what was it?

A. It was a wooden sign, painted white.

Q. Was it stuck in the ground or suspended or what?
A. It was put in the ground like an ordinary sign.
Q. Do you recall the exact language that was on it?
A. No, I do not.
Q. Do you recall the substance of the language?
A. Yes, sir.
Q. What was it?
A. City limits.

Mr. Whittaker: If the Court please, we ask that evidence be stricken out as not being competent evidence of the location of the City limits.

The Court: Strike it out, you can show the city limits, if that is important.

Mr. O'Donnell: Exception."

The witness ran levels from the College crossing to a point 1500 feet east of the crossing. The levels were made with a transit with a level on it. The grade was described as 0.35%, plus rises. There was a rise toward the west of practically 4 inches in each 100 feet, or five and one-fourth feet in 1500 feet. The crossing was five and one-fourth feet [fol. 33] higher than the railroad track at a point 1500 feet east of the crossing. From a point 1500 feet east of the crossing the grade was level toward the east for a distance of 400 feet. The witness noted on the plat a "Soldiers' Arch." The distance from the crossing to the center of the Arch was described as 460 feet. From the center of the crossing to a place on the track opposite the Quigley house measured 385 feet. The Quigley house was described as 200 feet south of the track. The witness described the buildings and the college grounds as varying in size. There are different kinds of buildings, one is a church, and two of them are marked "school houses" and there are two buildings there that are four-stories, one stone and the other one brick. They appeared to be dormitories and the large stone building in the rear is a two-story, and there is another three-story, and the administration building is a two-story. These buildings were described as 300 to 400 feet north of the railroad track. To the east of the crossing and entrance to the college grounds is located a grandstand upon the Athletic Field.

Cross-examination:

The witness said he did not know the conditions at the time of the accident in December, 1927. Beginning at a point 2,006 feet east of the crossing and then running toward the west for a distance of 400 feet the railroad track is practically level; and running from that point toward the crossing there is an inclining grade of 35/100ths of one per cent. From a distance 1600 feet east of the crossing going west toward the crossing, the track goes up slightly. The railroad at this place is a single track road. Highway No. 40 parallels the railroad track and lies to the south. The distance is 71½ feet from the south rail of the railroad track to the north side of the slab on Highway No. 40. The highway was not paved with a slab in 1927. Measurements were taken by the witness at the crossing and at a point 200 feet east of the crossing and the road and slab run parallel for that distance. At a distance of 300 feet east of the crossing the highway does not run exactly parallel with the railroad. The highway veers slightly to the south and then goes on east again, approximately 160 feet from the track for a distance of probably half a mile. Highway No. 40 is a main artery of travel from Kansas City to Lawrence, Topeka, Fort Riley, St. Marys, Abilene, Salina and Denver. The railroad track from the crossing east to a point 2,006 feet east of the crossing is built up some higher than the adjacent land, on a grade and ballast. At a distance of 2,000 feet east of the crossing the railroad track is [fol. 34] four or five feet higher than the abutting land, and slopes to the west until at the crossing the railroad track is about two or two and a half feet higher than the adjacent land. The railroad track from a point 2,009 feet east of the crossing makes no curves or bends and there is a clear view through there. There are no buildings or hills south of the railroad track to obstruct the view and no cuts of any consequence.

"Mr. Whittaker: The railroad track as constructed there would be visible to one standing upon the highway at any point from a distance 2,009 feet east of the crossing up to the crossing, wouldn't it?

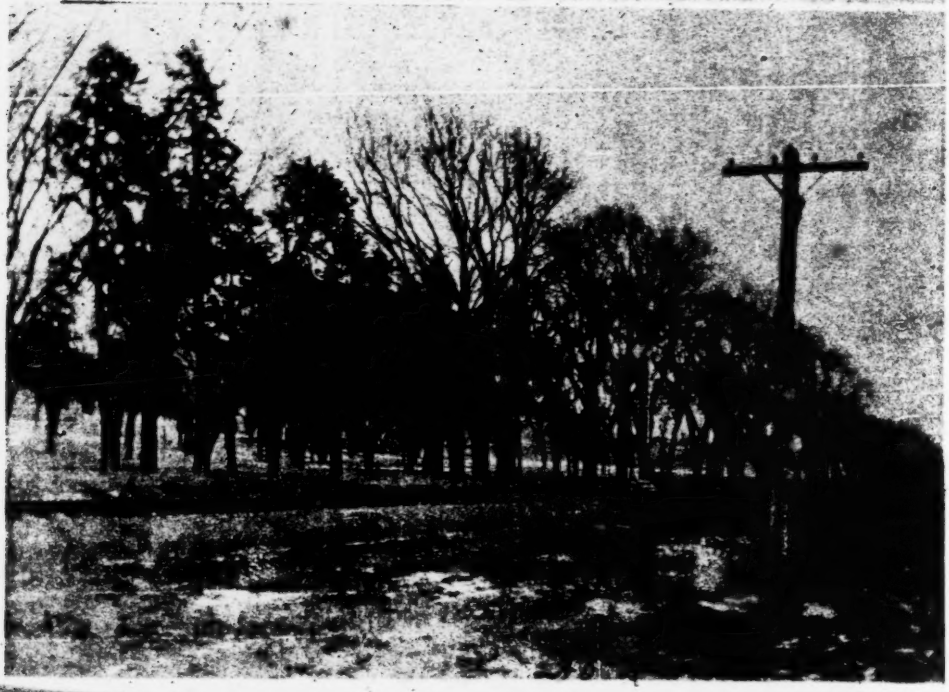
Mr. O'Donnell: It may be agreed that what you say is correct about it, that there is no obstruction of any character."

The defendant's Exhibits A, B, C, D, E, F and G, were shown to and identified by the witness and he described the conditions that he found about as shown in these pictures. Exhibit "A" is a photograph of this crossing with the camera pointed north and slightly east. Exhibit "B" is a photograph of the view toward the east of the crossing taken with the camera directed toward the northeast and stationed at the northeast corner of the intersection of Highway No. 40 and the roadway leading to the College. Exhibit "C" is a photograph looking east and slightly south, the camera being stationed in the center of the track ninety feet west of the crossing. Exhibit "D" is a photograph taken with the camera stationed approximately thirteen feet south of the south rail of the track and on the east side of the roadway leading over the track and into the College, the camera facing straight east. Exhibit "E" is a kodak picture, looking east, taken from a point forty-five feet south of the south rail of the railroad track and approximately in the center of the roadway leading to the College. Exhibit "F" is a kodak picture taken from a point four or five feet east of the crossing and a little south of the crossing, looking east. Exhibit "G" is a kodak picture, looking toward the east and slightly north, the kodak being held at the northeast corner of the intersection of Highway No. 40 and the road leading north over the crossing. Exhibits A, B, C, D, E, F, and G, were offered and received in evidence and are as follows:

(Here follow exhibits, side folios 34a, b, and c)

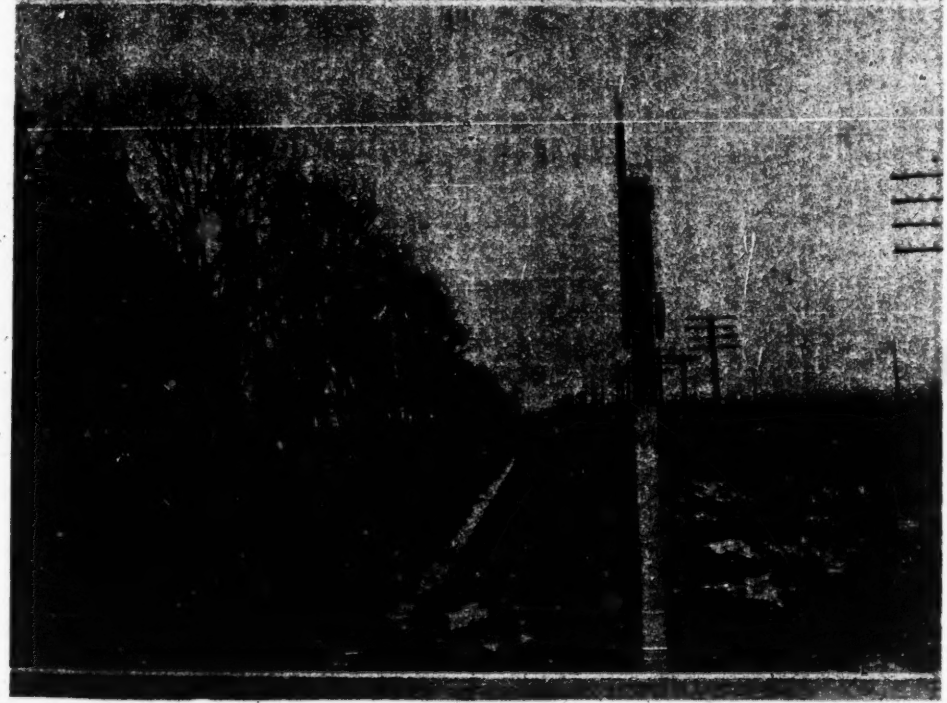
Defendants Exhibit 34a

Defendants Exhibit B.



Defendants Exhibit "C" 34b

Defendants Exhibit "D"



Defendants Exhibit

Defendants

Defendants Exhibit

[fol. 35] "Q. Now, referring to Exhibits C, D, E and F, I will ask you to state whether or not it is possible to see in those pictures the railroad track as far east as that point you have mentioned 2,006 feet east of this crossing?

A. There is no doubt about that.

Q. And you can see even further and beyond?

A. Yes, sir.

Q. You can see down there for three-quarters of a mile at least, Mr. Koehler?

A. Approximately so, I would say."

The crossing over the railroad track leads from the public highway to St. Marys College and is an entrance to the College from the south. On the west side of the College and some distance north of the railroad track is another roadway that leads into the College, known as "Mission Street." The roadway that leads over the crossing and into St. Marys College is an entrance to the College. Within the College grounds there are drives, roadways, and paths that wind around the various buildings and you can enter and leave the College grounds over the crossing in question or you can enter and leave through Mission Street that runs into the College grounds at the west side of the College. There is a whistling post located 1200 feet west of the west side of the crossing, but witness did not know how long it had been there.

Re-direct examination.

By Mr. O'Donnell:

The whistling post to the west was 1,290 feet from the crossing. Witness identified Plaintiff's Exhibit "7" as a photograph of the entrance to the College grounds as he saw it. Plaintiff's Exhibit "2" was identified as a photograph of the same crossing, showing the crossing and No. 40 Highway, also the crossing sign and the railroad track. Plaintiff's Exhibit "3" was identified as a photograph from the crossing, looking west and south toward No. 40 Highway. This exhibit showed the residences to the southwest. Plaintiff's Exhibit "4" was identified as a photograph, looking east and south, showing the crossing, the railroad track and the highway. Plaintiff's Exhibit "5" was identified as another picture of the crossing, looking northeast. Plain-

tiff's Exhibit "6" was identified as a picture taken from a [fol. 36] point east of the crossing, looking west, showing the railroad track and No. 40 Highway and the houses to the south of No. 40 Highway. The plaintiff offered Exhibits 2, 3, 4, 5, 6 and 7, in evidence.

"The Court; The exhibits will now be received.

Said Exhibits 2, 3, 4, 5, 6 and 7 are as follows:

(Side folios 36a and 36b)

Plaintiff Exhibit 2"

36a

looking West

Plaintiff

looking West

Plaintiffs Exhibit 2"

looking East

60

36b

Looking East on Little Rock

Plaintiffs Exhibit 6

Looking West on right of way

Plaintiffs Exhibit 7

Looking North at Entrance on Highway

[fol. 37] Mr. Whittaker: Mr. O'Donnell, may it be admitted that the photographs offered as exhibits by plaintiff and the photographs offered as exhibits by defendant show the true physical conditions existing as of December 11, 1927, with the exception of the slab that has been subsequently put in the paving.

Mr. O'Donnell: Well, I expect that is the fact about it, although I have no personal knowledge of it, if you say so.

Mr. Whittaker: They are. Our pictures were taken the next morning.

Mr. O'Donnell: All right."

Redirect examination.

By Mr. O'Donnell resumed:

"Q. Now, Mr. Koehler, I notice that Mr. Whittaker has been referring to this entrance as a private road, do you know where he gets that, Mr. Koehler, do you know why he asks that question, do you know anything about that?

A. No, I do not.

Q. Well, I notice in Defendant's Exhibit 'A' there is a railroad crossing sign over the crossing, now you may state whether or not that crossing sign, so that the record will get it, is the same sort of crossing sign as there is for any crossing that you may see as you go up there?

A. Yes, sir.

Q. All the same?

A. Practically the same.

Q. Well, is there any difference?

A. No, I don't know if there is any difference in the size of it, but it is the cross arm sign you see at all railroads, nearly all of them."

Mrs. Agnes Miller, called as a witness, testified that she was a sister of Mrs. Andlauer, the deceased; that Mrs. Andlauer was thirty-five years of age, in good health, the mother of three children, Clement, a boy aged fourteen; Ellanore, a girl aged twelve, and Mary Jane, a girl aged nine; that Mrs. Andlauer was the wife of Marcus Andlauer, the deceased; that they lived in Topeka, Kansas; that Mrs. Andlauer was employed about her domestic duties around

the home and that Mr. Andlauer was employed at the time of his decease. She testified that Mrs. Andlauer took care of the home and the children and that she did her own household duties and had no maid.

Miss ELLANORE ANDLAUER, called as a witness, testified that she was sixteen years of age at the time of the trial and was making her home with Mrs. Miller, her aunt; that [fol. 38] her brother at the time of the accident was attending college at St. Marys, Kansas, and that her parents were on the way to visit this brother at the time of the accident; that her mother's health at the time she left home on the fateful day was good.

WILLIAM H. MILLER, called as a witness, testified that he is a mechanical engineer in the employ of the Ismert-Hincke Milling Co.; that he knew Marcus Andlauer for twenty-five years. Witness had been with the Milling Company since August 1, 1907; that Mrs. Andlauer was the sister of witness's wife and at the time of his death Marcus Andlauer was with the Ismert-Hincke Milling Company and had charge of the Topeka Mill and also called on some customers; that he had been with the Milling Company for twelve or fifteen years prior to his death; that he had worked in different departments and had been advanced to his position before his death; that he had been a salesman and St. Marys, Kansas was on his route as such; that he visited St. Marys, Kansas, either once a week or every other week, selling the product of the Milling Company; that the son of Marcus Andlauer was attending school at St. Marys, Kansas; that Mr. and Mrs. Andlauer visited the son most every Sunday; that Mr. Andlauer was accustomed to driving automobiles and had been so accustomed for about five years; that witness first heard of the accident about four o'clock on Sunday afternoon, December 11, 1927; that he immediately went to Topeka and found the bodies had not been brought back from St. Marys; that he saw the bodies on the 12th, the day after the accident, and recognized them; that Mr. Andlauer's income was $200.00 a month; that Mrs. Andlauer attended to the household duties and had no maid; that she was strong and healthy and took care

of her children; that he was appointed guardian and administrator.

"Mr. O'Donnell: I offer in evidence Plaintiff's Exhibits 8, 9 and 10.

Mr. Whittaker: If the Court please, we object to the introduction of Plaintiff's Exhibit 10, letters of guardianship, as having no bearing upon any issue in this case and being wholly incompetent, irrelevant and immaterial.

Mr. O'Donnell: The only purpose of offering those is in response to his plea in abatement.

The Court: It is overruled.

Mr. Whittaker: Exception."

Plaintiff's Exhibits 8, 9 and 10 were received in evidence and are hereto attached and are as follows:

[fol. 39] PLAINTIFF'S EXHIBIT "8"

Letters of Administration

THE STATE OF KANSAS,
Shawnee County, ss:

IN PROBATE COURT

To all to whom these presents shall come, Greeting:

Know ye, That whereas Mark A. Andlauer late of said County of Shawnee, died, intestate, as it is said, having at the time of his death, property in this State which may be lost, destroyed or diminished in value if speedy care be not taken of the same: To the end, therefore, that said property may be collected, preserved and disposed of according to law, we do hereby constitute and appoint William H. Miller, of Wyandotte County, Administrator of all and singular the goods and chattels, rights and credits which were of the said Mark A. Andlauer at the time of his death, with full power and authority to secure and dispose of said property according to law, and collect all moneys due said deceased, and in general to do and perform all other acts and things which are or hereafter may be required of him by law or the decree or order of any Court having jurisdiction.

In Testimony Whereof, I, W. T. Chaney, Judge of the Probate Court in and for said County, do hereto set my

hand and affix the seal of said Court, this 16th day of December, A. D. 1927.

W. T. Chaney, Probate Judge. (Seal.)

STATE OF KANSAS,
Shawnee County, ss:

IN PROBATE COURT

I, W. T. Chaney, Judge and ex-officio Clerk of the Probate Court within and for the County of Shawnee and State of Kansas, having by law the custody of the seal and all the records, books, documents, files and papers of and pertaining to said Court, hereby certify that the above and foregoing is a full, true and correct copy of Letters of Administration, in the Matter of the Estate of Mark A. Andlauer, Deceased, as the same appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court, at my office in the City of Topeka, in said County and State, this 25th day of January, 1928.

W. T. Chaney, Probate Judge and ex-Officio Clerk. (Seal.)

[fol. 40] PLAINTIFF'S EXHIBIT "9"

Letters of Administration

THE STATE OF KANSAS,
Shawnee County, ss:

IN PROBATE COURT

To all to whom these presents shall come, Greeting:

Know ye, That whereas Ellanore Andlauer, late of said County of Shawnee, died, intestate, as it is said, having at the time of her death, property in this State which may be lost, destroyed or diminished in value if speedy care be not taken of the same: To the end, therefore, that said property may be collected, preserved and disposed of according to law, we do hereby constitute and appoint William H. Miller, of Wyandotte County, Administrator of all and singular, the goods and chattels, rights and credits which

were of the said Ellanore Andlauer, at the time of her death, with full power and authority to secure and dispose of said property according to law, and collect all moneys due said deceased, and in general to do and perform all other acts and things which are or hereafter may be required of him by law or the decree or order of any Court having jurisdiction.

In Testimony Whereof, I, W. T. Chaney, Judge of the Probate Court in and for said County, do hereto set my hand and affix the seal of said Court, this 16th day of December, A. D. 1927.

W. T. Chaney, Probate Judge. (Seal.)

STATE OF KANSAS,
Shawnee County, ss:

IN PROBATE COURT

I, W. T. Chaney, Judge and ex-officio Clerk of the Probate Court within and for the County of Shawnee and State of Kansas, having by law the custody of the seal and all the record-, books, documents, files and papers of and pertaining to said Court, hereby certify that the above and foregoing is a full, a true and correct copy of Letters of Administration, in the Matter of the Estate of Ellanore Andlauer, Deceased, as the same appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court, at my office in the City of Topeka, in said County and State, this 25th day of January, 1928.

W. T. Chaney, Probate Judge and ex-Officio Clerk.
(Seal.)

[fol. 41] PLAINTIFF'S EXHIBIT "10"

Letters of Guardianship

IN PROBATE COURT

THE STATE OF KANSAS,
Shawnee County, ss:

To all to whom these presents shall come, Greeting;

Know ye, That whereas, Clement Andlauer, Eleanor Andlauer and Mary Jane Andlauer, Minors, have property,

rights and credits, in said county and elsewhere, that may be lost, destroyed, or diminished in value, if speedy and proper care be not taken of the same: to the end, therefore, that the estate, rights and property, and the person of the said minors be properly cared for and protected, I, W. T. Chaney, Probate Judge in and for the aforesaid county, do hereby constitute and appoint William H. Miller of Wyandotte county, Guardian of the persons, estate and property of whatsoever kind that may appertain or belong to said minors; with full power and authority to collect and dispose of any or all their estate, property, rights and credits, according to law; and in general, to do and perform all other acts and things which are, or hereafter may be, required of him by law or the decree of any court having jurisdiction.

In testimony whereof, I, W. T. Chaney, Judge of the Probate Court in and for said county, do hereto set my hand and affix the seal of said court, this 16th day of December, 1927.

W. T. Chaney, Probate Judge. (Seal.)

State of Kansas,
Shawnee County, ss:

In Probate Court

I, W. T. Chaney, Judge and ex-officio Clerk of the Probate Court within and for the County of Shawnee and State of Kansas, having by law the custody of the seal and all the records, books, documents, files and papers of and pertaining to said Court, hereby certify that the above and foregoing is a full, true and correct copy of Letters of Guardianship, in the Matter of the Estate of Clement Andlauer, et al. Minors, as the same appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court, at my office in the City of Topeka, in said County and State, this 11th day of January, 1928.

W. T. Chaney, Probate Judge and ex-Officio Clerk.
(Seal.)

[fol. 42] "Mr. O'Donnell: We now offer Plaintiff's Exhibits 11 and 12, these being the orders of the Probate

Court reopening these estates and directing him to take charge on the 25th day of February, 1931.

Mr. Whittaker: If the Court please, the instruments speak for themselves. We object to the interpretation of them by counsel as to reopening, and they speak for themselves.

The Court: Overruled; the instruments will be admitted for what the instruments show.

Mr. Whittaker: Exception."

Plaintiff's Exhibits 11 and 12 were admitted in evidence and are hereto attached and are as follows:

PLAINTIFF'S EXHIBIT 11

B. M.

IN THE PROBATE COURT OF SHAWNEE COUNTY, KANSAS

No. 9868

In the Matter of the Estate of MARK A. ANDLAUER, Deceased

Order

Now on this 25th day of February, 1931 comes on for hearing the application of William H. Miller for an order reopening the above estate.

Thereupon the Court Finds that Mark A. Andlauer died on the 11th day of December, 1927, intestate and that his estate was admitted to probate and administered and the estate closed on the 25th day of February, 1929; that it now appears that there is due the sum of ten thousand dollars to the estate from the Union Pacific Railway Company on account of the wrongful death of Mark A. Andlauer.

The Court Further Finds that William H. Miller is a resident of the State of Kansas and a competent, worthy and suitable person to assume the duties of administrator of said estate.

The Court Further Finds that the application to reopen said estate should be granted.

It Is Therefore By the Court Ordered and Decreed that the above estate be and the same is hereby reopened.

It Is Further Ordered that William H. Miller be and he is hereby appointed administrator herein and that he

execute his administrator's bond in the principal sum of $50.00 with conditions and sureties according to law.

J. F. Kaster, Probate Judge. (Seal.)

[fol. 43] STATE OF KANSAS,
Shawnee County, ss:

IN PROBATE COURT

I, J. F. Kaster, Judge and ex-officio Clerk of the Probate Court within and for the County of Shawnee and State of Kansas, having by law the custody of the seal and all the records, books, documents, files and papers of and pertaining to said Court, hereby certify that the above and foregoing is a full, true and correct copy of the Order dated February 25, 1931, in the Matter of the Estate of Mark A. Andlauer, deceased as the same appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court, at my office in the City of Topeka, in said County and State, this 25th day of February, 1931.

J. F. Kaster, Probate Judge and ex-Officio Clerk.

PLAINTIFF'S EXHIBIT 12

B. M.

In the Probate Court of Shawnee County, Kansas

No. 9862

In the Matter of the Estate of ELLANORE ANDLAUER, Deceased

Order

Now on this 25th day of February, 1931 comes on for hearing the application of William H. Miller for an order reopening the above estate.

Thereupon the Court Finds that Ellanore Andlauer died on the 11th day of December, 1927, intestate and that her estate was admitted to probate and administered and

the estate closed on the 25th day of February, 1929; that it now appears that there is due the sum of ten thousand dollars to the estate from the Union Pacific Railway Company on account of the wrongful death of Ellanore Andlauer.

The Court Further Finds that William H. Miller is a resident of the State of Kansas and a competent, worthy and suitable person to assume the duties of administrator of said estate.

The Court Further Finds that the application to reopen said estate should be granted.

It Is Therefore By the Court Ordered and Decreed that the above estate be and the same is hereby reopened.

[fol. 44] It Is Further Ordered That William H. Miller be and he is hereby appointed administrator herein and that he execute his administrator's bond in the principal sum of $50.00 with conditions and sureties according to law.

J. F. Kaster, Probate Judge. (Seal.)

STATE OF KANSAS,
Shawnee County, ss:

IN PROBATE COURT

I, J. F. Kaster, Judge and ex-officio Clerk of the Probate Court within and for the County of Shawnee and State of Kansas, having by law the custody of the seal and all the records, books, documents, files and papers of and pertaining to said Court, hereby certify that the above and foregoing is a full, true and correct copy of the Order dated February 25, 1931, in the Matter of the Estate of Ellanore Andlauer, deceased as the same appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court, at my office in the City of Topeka, in said County and State, this 25th day of February, 1931.

J. F. Kaster, Probate Judge and ex-Officio Clerk.
(Seal.)

Cross-examination:

Witness testified that he was discharged as administrator of the estates of Marcus Andlauer and Ellanore And-

lauer about the 25th day of February, 1929, by the Probate Court of Shawnee County, Kansas.

"Mr. Whittaker: Now we offer in evidence, if the Court please, Defendant's Exhibits H and I.

The Court: Received."

Defendant's Exhibits H and I, so admitted in evidence, are as follows:

DEFENDANT'S EXHIBIT "H"

STATE OF KANSAS,
Shawnee County:

IN THE PROBATE COURT OF SAID COUNTY

In the Matter of the Estate of MARK ANDLAUER, Deceased

Journal Entry—Final Discharge

And Now, on this 25th day of February, 1929, came William H. Miller the Administrator of the above-named [fol. 45] estate and makes payment of Court costs of said estate for the several sums ordered to be paid to said heirs and legatees by this Court, at the hearing of the final account of said William H. Miller as such Administrator, on the 25th day of February, 1929.

And it being made to appear to the Court that said Administrator has fully complied with said order of the Court in every particular,

Now, Therefore, It is by the Court considered, ordered and adjudged, that said estate be, and it is hereby, fully and finally closed.

And it is further considered, ordered and adjudged, that said Administrator and his sureties be and they are hereby discharged and released from any and all further liability on the bond of said William H. Miller as such Administrator.

W. T. Chaney, Probate Judge. (Seal.)

Probate Judge's Certificate of Copy with Verification

STATE OF KANSAS,
Shawnee County, ss:

PROBATE COURT

I, J. F. Kaster, sole Judge and ex officio Clerk of the Probate Court, within and for the County aforesaid, do

hereby certify the foregoing to be a true copy of Journal Entry of Final Discharge, in the Matter of the Estate of Mark Andlauer, Deceased, as the same appears from the records of said Court.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court at Topeka, Shawnee County, Kansas, this 13th day of February, A. D. 1931.

J. F. Kaster, Probate Judge and ex-Officio Clerk.
(Seal.)

STATE OF KANSAS,
Shawnee County, ss:

I, J. F. Kaster, sole Judge of the Probate Court, within and for said County, the same being a Court of Law and Record, hereby certify that the signature attached to the above certificate purporting to be that of J. F. Kaster, is his genuine signature, and that he was at the time thereof ex officio Clerk of said Probate Court, and as such full faith and credit are due his acts, and that the attestation of said Clerk is in due form of law, and by the proper officer.

[fol. 46] Witness my hand and the seal of said Court, at Topeka, Shawnee County, Kansas, this 13th day of February, A. D. 1931.

J. F. Kaster, Probate Judge. (Seal.)

STATE OF KANSAS,
Shawnee County, ss:

I, J. F. Kaster, Probate Judge and ex officio Clerk of the Probate Court in and for the said County, do hereby certify that J. F. Kaster, whose genuine signature is subscribed to the foregoing certificate, was at the date thereof Presiding Judge of said Court, duly commissioned, sworn and acting.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at the city of Topeka, Shawnee County, Kansas, this 13th day of February, A. D. 1931.

J. F. Kaster, Probate Judge and ex-Officio Clerk.
(Seal.)

DEFENDANT'S EXHIBIT "I."

STATE OF KANSAS,
Shawnee County:

IN THE PROBATE COURT OF SAID COUNTY

In the Matter of the Estate of ELLANORE ANDLAUER, Deceased

Journal Entry—Final Discharge

And Now, on this 25th day of February, 1929, came William H. Miller the Administrator of the above-named estate, and makes payment of Court costs, and files receipts of the Guardian of the Andlauer, minors of said estate for the sums ordered to be paid to said Guardian by this Court, at the hearing of the final account of said William H. Miller, as such Administrator, on the 25th day of February, 1929.

And it being made to appear to the Court that said Administrator has fully complied with said order of the Court in every particular,

Now, Therefore, It is by the Court considered, ordered and adjudged, that said estate be, and it is hereby, fully and finally closed.

And it is further considered, ordered and adjudged, that said Administrator and his sureties be and they are [fol. 47] hereby discharged and released from any and all further liability on the bond of said William H. Miller as such Administrator.

W. T. Chaney, Probate Judge. (Seal.)

Probate Judge's Certificate of Copy, with Verification

STATE OF KANSAS,
Shawnee County, ss:

PROBATE COURT

I, J. F. Kaster, sole Judge and ex officio Clerk of the Probate Court, within and for the County aforesaid, do hereby certify the foregoing to be a true copy of Journal Entry of Final Discharge, in the Matter of the Estate of

Ellanore Andlauer, Deceased, as the same appears from the records of said Court.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court at Topeka, Shawnee County, Kansas, this 13th day of February, A. D. 1931.

J. F. Kaster, Probate Judge and ex-Officio Clerk.
(Seal.)

STATE OF KANSAS,
Shawnee County, ss:

I, J. F. Kaster, sole Judge of the Probate Court, within and for said County, the same being a Court of Law and Record, hereby certify that the signature attached to the above certificate purporting to be that of J. F. Kaster, is his genuine signature, and that he was at the time thereof ex officio Clerk of said Probate Court, and as such full faith and credit are due his acts, and that the attestation of said Clerk is in due form of law, and by the proper officer.

Witness my hand and the seal of said Court, at Topeka, Shawnee County, Kansas, this 13th day of February, A. D. 1931.

J. F. Kaster, Probate Judge. (Seal.)

STATE OF KANSAS,
Shawnee County, ss:

I, J. F. Kaster, Probate Judge and ex officio Clerk of the Probate Court, in and for said County, do hereby certify that J. F. Kaster, whose genuine signature is subscribed to the foregoing certificate, was at the date thereof [fol. 48] Presiding Judge of said Court, duly commissioned, sworn and acting.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at the city of Topeka, Shawnee County, Kansas, this the 13th day of February, A. D. 1931.

J. F. Kaster, Probate Judge and ex-Officio Clerk of the Probate Court. (Seal.)

Witness testified that both Mr. and Mrs. Andlauer were in good health.

"Q. And they had, did they, normal eyesight?
A. Yes, sir.

Q. And normal hearing?
A. Yes, sir.
Q. No defects in those respects?
A. Not that I know of.
Q. And, of course, you would have known had such existed?
A. I think so."

MARY JANE ANDLAUER, called as a witness, testified that at the time of the trial she was thirteen years of age; that the mother took care of the children in the home, taking them to church and looking after them.

ARTHUR NAGLE, called as a witness, testified that he was twenty-eight years of age, lived in Havensville, Kansas, and was a garage owner; that he lived in St. Marys, Kansas, for five years; that while in St. Marys he was in the transfer business, working for his father, and driving a truck in and out of the city; that he was familiar with the streets of St. Marys and knew the location of Highway No. 40; that Highway No. 40 is the principal business street and it runs east and west through the town of St. Marys, Kansas; that the railroad track runs north of Highway No. 40 and parallel thereto; that he was familiar with the automobile entrance from U. S. Highway No. 40 to St. Marys College grounds, which entrance is about a half mile east of the main business part of St. Marys; that the residences along the south side of Highway No. 40 extended down to a point about 100 feet west of the entrance from Highway No. 40 to the College grounds; that the residences lined the south side of Highway No. 40; that [fol. 49] witness lived for a time in Emmett, Kansas, about eight miles away from St. Marys and witness was frequently in and around St. Marys; that he was familiar with the roads in St. Marys and has been for twenty years. Witness identified the entrance to St. Marys College from Highway No. 40, as shown on the exhibits. The entrance had existed, as shown in the pictures, for as long as the witness could remember; that the railroad cross-

ing sign shown on the exhibits had been located at this crossing and entrance to St. Marys College for as long as witness could remember; that witness, in driving the trucks about St. Marys, used this entrance most every day; that there were two entrances to the college grounds and that these were connected with cinder roads; that the crossing from Highway No. 40 to the College grounds was at all times open to the public and was much used; that St. Marys is a town of 1500 population; that between 1,000 and 1500 students attended the College and there were about 100 teachers and instructors and Priests located there; that the students mostly lived at the college in dormitories and on Sunday, in particular, there was more or less activity about the College grounds, more on Sunday than during the ordinary week day, on account of the visiting; that after witness moved away from St. Marys, he was back for the weekends visiting his folks; that No. 40 on the 11th day of December, 1927, was a graveled road; that the gravel at that time occupied about the same width that the slab does at the present time and was located in the same place as the present slab; that the gravel was possibly 10 feet wider than the present slab; that he did not know Mr. Andlauer during his lifetime. He saw the deceased on the day of the accident about twelve miles out of Topeka, driving on the highway in a westerly direction; that deceased was driving an Oldsmobile, closed car; that deceased passed the witness and that between the time he first saw deceased and the time of the accident he and deceased would slow up and he would go around him, then he would slow up and the deceased would drive around witness; that the public road crossed the railway tracks about a mile east of the College entrance; that he was familiar with the whistling post located east of the entrance to the college; that deceased passed witness last about a half mile east of the college entrance; that witness was driving an Oldsmobile sports roadster, which was an open car with no side curtains; that his hearing was good; that he did not hear any whistle from the engine of the train that struck deceased; that he had driven the road many times before and could hear the whistles of trains [fol. 50] at the whistling post east of the crossing on other occasions; that the weather was clear and cold.

"Mr. Kelly:

Q. And where were you when the collision occurred?

A. About five hundred feet East of the entrance to the college."

That when deceased last passed witness, witness was driving about 30 miles an hour and the speed of deceased was slightly faster. Witness saw deceased slow up and make a turn and drive right up on the track and the train hit him; that deceased turned at right angles to No. 40 and drove north to the railroad track; that deceased after making the turn was not going any faster than 15 miles an hour and no slower than 10. Witness' best judgment was deceased was driving about twelve miles an hour from the time he made the turn until the collision. That witness' attention was first directed to the train when it passed him about five hundred feet east of the crossing; that he had not heard the train before and had not heard any bell or whistle; that there was nothing to prevent him hearing the bell or whistle, if one had been sounded; that the car he was driving was one which did not make an unusual amount of noise and that he had driven the same car before and that he could and had heard the whistle of trains at other times while driving this same car; that he saw the actual collision between the train and the automobile and that witness was about 200 feet east of the crossing when the collision occurred; that there was a mile sign on the south side of Highway No. 40 which tells the distance between one town and another at about the place where witness' car was located when the collision occurred. Witness identified the mile sign on the plat introduced in evidence; that witness was familiar with speed from his experience in driving automobiles and he fixed the speed of the passenger train at 55 to 60 miles an hour. Witness was driving at thirty miles an hour and the train was going as fast again.

At this point WILLIAM H. MILLER was recalled and testified that Marcus Andlauer made frequent visits to St. Marys, Kansas, and vicinity; that he was supposed to call on his customers there every two weeks; that deceased

frequently took the train of the Union Pacific Railway Company that left Kansas City at 10:40 in the morning; that Marcus Andlauer visited his son at St. Marys College most every Sunday, from September until the date of the accident. Witness testified that Andlauer before 1927, [fol. 51] used to take the train that collided with his car quite often but after July, 1927, they bought him a car and he did not use the train so much thereafter.

On re-cross examination, Mr. Miller testified that his headquarters is in Kansas City, but he has charge of the Topeka Mill also; that he had seen Mr. Andlauer take the train at Topeka, but not always; that at times when he was in Topeka over night he would take him to the train in the morning. He could only recall one specific instance where he had taken him to catch the train that was involved in the accident.

Arthur Nagle, recalled, testified that the train involved in the collision was due at St. Marys at 1:18 P. M.; that the train was about an hour and one-half late on the day of the accident.

"Q. Had you observed this particular train going through there many times during the time you were living in St. Marys and the times you have been around there?

A. Yes, sir.

Q. Had you observed the custom of that train as it approached that particular crossing as to speed?

Mr. Whittaker: If the Court please, we object to that question as having no bearing upon this lawsuit, not directed to any issue involved in the case, does not show or tend to show any knowledge on the part of decedents with reference to speed of this train and we object to it.

The Court: Objection overruled at this time.

Mr. Whittaker: Exception.

A. It usually slowed up.

Q. To about what speed as it crossed that crossing?

A. About twenty-five to thirty miles an hour."

That at the time of the impact, witness could see the rear end of the Andlauer car; that the Andlauer car was about

nine and one-half feet long; that the rear wheels of the car were about on the south rail at the time of the impact and the automobile was going directly north; that the train ran about four and one-half blocks after the collision before it stopped; that the train stopped at a place on the track directly behind the residence of Mrs. Buchholz; that witness drove after the collision down to a place on the highway and stopped almost up to the train and then witness went over to the train; that the automobile was in front of the cow-catcher, partly on the train; that the body of Mr. Andlauer was under the wreckage; that Mr. Andlauer was dead when witness arrived at the wreckage; that Mrs. Andlauer was in the car and was unconscious and died about twenty-five minutes thereafter; that Mrs. Andlauer [fol. 52] was carried while still alive into the residence of Mrs. Buchholz, where she died; that witness was present when she died twenty-five minutes later.

On cross examination witness testified he left Topeka about 2:30 in the afternoon; that Topeka is 26 miles east of St. Marys; that Mr. and Mrs. Andlauer passed witness first when about twelve miles west of Topeka; that there is a railroad crossing one mile east of St. Marys College, known as the "Iminshook Crossing"; that witness noticed the semaphore was up when he crossed the Iminshook Crossing but he did not know that this indicated that a train was approaching within the block; that after crossing the Iminshook Crossing, witness traveled about thirty miles an hour; that when witness was a half mile from St. Marys College the Andlauer car passed him; that witness was traveling 25 to 30 miles an hour when Andlauer passed; that Andlauer was going five or possibly ten miles per hour faster than witness' car when it passed him.

"Q. And when you were within five hundred feet of this crossing you say you saw the train coming?

A. It passed me.

Q. Then, of course. you saw it?

A. Yes, sir.

Q. And at that time the train was somewhat ahead of you, the engine?

A. Yes, sir.

Q. And then Mr. and Mrs. Andlauer had only just prior to that passed you on 40 highway?

A. They passed me a lot further back than that.

Q. Half a mile back?

A. Yes, sir.

Q. So where were they, where was their automobile when you saw the train come up past you going West?

A. Well, it just left the highway, pulling into the College.

Q. Just leaving 40 highway turning toward the North?

A. They were already headed North.

Q. Just headed North, is that your answer?

A. They were off the slab already.

Q. But just starting into this road that leads in to the college?

A. Yes, sir.

Q. How far ahead of you was the train then?

A. I cannot answer that question; they went by me driving faster than I was.

Q. And you say your judgment was the train was going fifty-five to sixty?

A. I was traveling thirty and they pass me.

Q. That you say was your judgment that the train was going fifty-five to sixty miles an hour?

A. Yes, sir.

Q. And how fast was the automobile of the Andlauer's traveling?

[fol. 53] A. It couldn't have been traveling over twelve miles an hour making that turn.

Q. The train would be then within not more than four hundred feet of the crossing toward the East and in plain sight, wouldn't it?

The Court: Plain sight of whom?

Q. Of any person in the position in which the Andlauer car was?

A. About two hundred feet then when I noticed it had appeared.

Q. The train was about two hundred feet then of the crossing, is that what you mean to say?

A. Yes, sir.

Q. And that is just after the Andlauers had turned the corner and started North?

A. Yes, sir.

Q. You say it was a clear, cold day?

A. Yes, sir."

The accident happened about 3:30 o'clock, somewhere in there. Trains passed over this track at all hours of the day and night of varying sizes and speed. The witness did not know whether the day was sufficiently cold that normal persons would have the windows of their car closed, but does know that the north window of the Andlauer car was closed as it passed him.

ERNEST QUIGLEY testified as follows: That he lived at St. Marys, Kansas. He had lived there since October 2, 1902. He is an umpire in the National League of Baseball Clubs and an athletic official, refereeing football games and basketball games. He was director of athletics in St. Marys College from October 1, 1902, until April 1, 1914. He had attended the University of Kansas. His home was located about 200 feet from the crossing of Highway No. 40 into St. Marys College. The population of St. Marys was described as 1,130 and there were 500 students in St. Marys College and in addition 56 professors in the College. The crossing in question was used very generally for entrance to the College ground. It connects with the road going west to the administration building and to Mission Street. The train involved in the collision was due to arrive at St. Marys from the east at 1:18 P. M. The witness was sitting in his home when his attention was attracted to the train involved in the collision. He was sitting on the davenport talking to Mrs. Quigley. The witness should have been on that train was the reason that it came to his attention. He went home that day on the motor train and the train not having come in, the witness realized that he had gotten home an hour or so before he would have been home had he come on that train and when witness heard the train coming he realized that it was coming with speed and the speed of the train and [fol. 54] the impact of hitting something and the shrieking of some group of children across the right-of-way attracted the witness. Witness saw the train as it passed his home, but did not see it before. From witness' experience in driving automobiles and from watching athletes he was a judge of speed. His estimate was that the train was going fifty miles an hour when he saw it. Witness, from within his house, heard the rumble of the approaching train before

he heard the impact. Witness identified the location of his house on Plaintiff's Exhibit 6. Witness testified that his house was approximately 200 feet from the crossing in a diagonal direction to the southwest; that he did not hear any whistle and did not hear any bell sounded by the train at any time; that after the accident witness put on his sweater and went over to the scene; that the engine stopped just behind the residence of Mrs. Buchholz. Some attention had been given to the two bodies but his particular attention was directed towards the lady. She was very seriously injured, but she was not dead at that time; that witness at that time lived in the city of St. Marys, Kansas.

ARTHUR NAGLE, recalled and testified that Mr. Andlauer was driving the Andlauer car.

RALPH L. GOOLD, 39 years of age, testified that his business was in the Transportation Department of railroad work; that he had been so engaged for fifteen years as a locomotive fireman and also as an emergency engineer; that he had worked on the Missouri Pacific, the Omaha Division, and also on the Santa Fe, in the Eastern Division. That he ran engines in emergencies when there wasn't regular engineers. That he was familiar with the method used by engineers in giving the warning as the train approached crossings; that it takes an engineer just long enough to reach the cord and pull it to sound his whistle; that he knew the character of brakes used on passenger trains; that he was familiar with air brakes; that it takes just long enough to remove the handle of the brake lever to put it in the position you want it in, emergency, or running position, or wherever you want it. That a passenger train of the size of the train in question, going fifty to sixty miles an hour could be stopped in 500 to 1,000 feet, with safety to the passengers on the train; that when the air is applied, it applies to the drive wheels on the engine and also to the tank wheels and [fol. 55] all wheels underneath all the rest of the equipment. The brakes used apply to all wheels.

On cross-examination, witness testified he had never worked for the Union Pacific; that he did not see the train

in question, but that he was familiar with the class of engines that they use on those trains; that he did not know what this engine was, nor know its weight, and never saw or examined the braking apparatus of that particular engine, nor had he been in any of the cars on that particular place on that line of railroad. Witness never had a regular run operating a passenger train and never operated a passenger train in the regular service.

"Mr. O'Donnell: We offer in evidence Section 130 of the Revised Ordinances of St. Marys, Kansas, 1924, contained in the bound volume marked Revised Ordinances of the City of St. Marys, Kansas, 1924. A compilation of all the ordinances of a general nature up to and including Ordinance Number 451, passed by the City Commission and rules and order of business. Revised and compiled by John G. Stutz, Secretary League of Kansas Municipalities, Harvey Walker, Assistant Secretary, League of Kansas Municipalities, Lawrence, Kansas, published by authority of the City of St. Marys, January, 1925.

Mr. Whittaker: We object to that for the reason in the first place it is not the proper way to prove such an ordinance, and in the second place it is wholly incompetent, irrelevant and immaterial to any issue in this case; in the third place it is not pleaded and no issue in this case and is not competent for any purpose.

The Court: Certainly the first ground is well taken, but I will inquire of counsel now, have you any authorities that you care to call the Court's attention to that the ordinances if properly identified and offered are pertinent to the issues in this case.

Mr. O'Donnell: Well, there is a case.

The Court: I will look at it if you have one. If it is important it ought to be more particularly identified and proved and the Court will reserve its ruling on this question until you have an opportunity, if you desire to identify the ordinances by proof. Moreover, if it is competent at all and counsel is satisfied it is the ordinance, of course, the Court's time ought not to be taken up very much on the question of identification, but I will reserve the ruling on the matter until later."

Mr. O'Donnell: Your Honor please, I notice that this book has the certificate of the Clerk with the seal of the [fol. 56] City and also I have the Kansas and Missouri statutes holding that it is competent and also a decision of the Missouri Supreme Court holding that an ordinance under these circumstances is admissable. We now offer Section 130.

Mr. Whittaker: We renew our objection on the ground that it is wholly incompetent, irrelevant and immaterial to any issue in this case and that it has not been properly pleaded or proved in the case.

The Court: Objection overruled.

Mr. Whittaker: Exception."

Said exhibit, so offered and received in evidence, reads:

OFFER IN EVIDENCE

"Section 130. Speed of Trains. Section 87.—That no person or corporation, operating or who may hereafter operate a steam railroad into or through this city shall permit any train to be operated within this city at a rate of speed in excess of twenty miles per hour nor in any manner which is dangerous to public safety. Any person or corporation violating any provisions of this section shall, upon conviction thereof, be fined not less than twenty-five dollars nor more than one hundred dollars."

The Court: I am not clear, Gentlemen, whether the record shows in what part of the automobile Mrs. Andlauer was riding, the wife, I do not know whether it was intended to show it or not.

Mr. O'Donnell: My understanding of the evidence was that she was riding in the front seat beside her husband. If the record does not so show, it may so show.

Mr. Whittaker: That is true, that is our understanding. May it also show that this automobile was the regular left-hand drive?

Mr. O'Donnell: Yes, sir."

The plaintiff offered in evidence all of his exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, and Defendant's Exhibits A, B, C, D, E, F, G, H, and I were offered and re-

ceived in evidence, and all of said exhibits are hereto attached and made a part hereof.

"Mr. O'Donnell: Plaintiff rests."

[fol. 57] And, thereupon, plaintiff rested his case, and thereupon, after plaintiff had rested his case, Mr. Whittaker, counsel for the defendant, said:

"Defendant now offers separate demurrers as to count one and count two of plaintiff's petition and requests the Court to charge the jury as in said demurrers requested."

Said demurrers are in words and figures as follows:

DEFENDANT'S REQUESTED INSTRUCTIONS

I

"At the close of the plaintiff's evidence the defendant requests the court to charge the jury that under the law and the evidence plaintiff is not entitled to recover upon Count I of his petition and their verdict must be for the defendant on Count I of plaintiff's petition."

II

"At the close of the plaintiff's evidence the defendant requests the court to charge the jury that under the law and the evidence plaintiff is not entitled to recover upon Count II of his petition and their verdict must be for the defendant on Count II of plaintiff's petition."

DEFENDANT'S MOTION FOR DIRECTED VERDICT

"Mr. Whittaker: The defendant at the close of the evidence moves the Court in the alternative to direct a verdict for the defendant against the plaintiff or dismiss the case upon the merits with prejudice and with costs as to count one of plaintiff's petition and also as to count two of plaintiff's petition.

The Court: The Court during recess has read carefully the case plaintiff relied upon, the Can Case in which the opinion was written by Judge Reeves, and I am quite satisfied that Judge Reeves did not have in mind in that case

to in anywise reverse or change the rule of law in this Circuit laid down in the Bradley Case. It is predicated upon an entirely different state of facts, and I am sure that none of the Judges sitting with him at that time had any such intention, nor did they refer to the Bradley Case with the intention of changing it.

ORDER DISMISSING ACTION

Gentlemen of the Jury, the duties of a jury and the Court are separate and distinct. The duty of the Court is to declare the law of the case; the duty of the jury is to decide controverted questions of fact, and the jury cannot invade the jurisdiction of the Court and the Court will not invade [fol. 58] the jurisdiction of the jury. When I say controverted questions of fact I mean where there is a dispute as to what the fact is. For instance, where witnesses for plaintiff testify to one state of facts and the defendant's witnesses testify to a different state of facts, that presents a question for the jury then to determine what the facts really are. But in this case, there are no disputed questions of fact. The evidence is all on the part of the plaintiff and we assume that it is all true, but defendant says that assuming that all of the testimony on the part of the plaintiff is true, nevertheless under the law the plaintiff may not recover, so that presents a proposition of law for the Court to decide, not for the jury. The facts in this case are such that it is clearly apparent to the Court that if the jury should return a verdict the Court would be bound to set it aside, because under the facts, if all true, under the law the plaintiff may not recover in this case. The defendant's motion in the alternative is sustained, the petition and the cause of action respectively set forth in Counts One and Two of the petition are dismissed on the merits with prejudice and with costs to the defendant to be taxed by the Clerk, and the plaintiff is allowed an exception to the ruling of the Court."

And the plaintiff then and there excepted to the ruling of the court in sustaining the defendant's motion in the alternative and in dismissing the petition and causes of action

respectvely set forth in Counts One and Two of the petition, with prejudice, and in entering a judgment dismissing the said cause, with such prejudice, and for costs against the said planitiff, for the reason that under the pleadings and the evidence the plaintiff was entitled to recover and was entitled to have the cause submitted to the jury upon Count One and also upon Count Two of the plaintiff's petition and the said exceptions were taken severally and to the action of the court upon each count of the plaintiff's petition.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The above and foregoing Bill of Exceptions contains all of the evidence introduced at the trial of said cause, all of the rulings of the court, all of the exceptions allowed, all of the instructions given and asked, and each and every matter therein contained is true and correct, and the same is hereby signed, sealed, certified to and allowed as a full, true and complete bill of exceptions in and for said cause and it is ordered to be filed as a record herein and it is [fol. 59] hereby made a part of the record in said cause this 27th day of May, 1932.

Andrew Miller, United States Judge who presided at the trial of said cause and assigned for the Western Division of the Western District of Missouri.

IN UNITED STATES DISTRICT COURT

AGREEMENT AS TO BILL OF EXCEPTIONS

It is agreed by the parties hereto that the above and foregoing is a true and correct bill of exceptions in the above entitled cause.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff. Watson, Ess, Groner, Barnett & Whittaker, Attorneys for Defendant.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fols. 60 & 61] Appearances of counsel omitted in printing.

[fol. 62] Minute entries of argument and submission, December 13th and 14th, 1932, omitted in printing.

[fol. 63] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, NOVEMBER TERM, A. D. 1932

No. 9554

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, Deceased, Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Missouri

Mr. Martin J. O'Donnell (Mr. George H. Kelly and Mr. William Buchholz were with him on the brief), for appellant.

Mr. C. V. Garnett (Mr. T. M. Lillard, Mr. Bruce Hurd, Mr. Charles E. Whittaker and Messrs Watson, Ess, Groner, Barnett & Whittaker were with him on the brief), for appellee.

Before Kenyon, Gardner, and Sanborn, Circuit Judges

OPINION—Filed Feb. 17, 1933

GARDNER, Circuit Judge, delivered the opinion of the court:

This is an action for damages for death by wrongful act. Plaintiff's intestates, Marcus Andlauer and Ellanore Andlauer, husband and wife, were killed on a railroad crossing

near St. Marys, Kansas, December 11, 1927. It is charged in the petition that the defendant railroad company was [fol. 64] negligent in operating its train at an excessive speed; that the trainmen failed to sound the crossing whistle; that they failed to warn plaintiff's intestates, or slacken the speed of the train after they knew, or could have known, of their peril. Defendant's answer is in effect a general denial and a plea of contributory negligence.

At the place where the accident occurred, defendant's railway track runs east and west, while Highway No. 40 runs in the same direction, but to the south of and parallel with the railway track for some considerable distance. St. Marys College is located north of the railway tracks, the grounds of which are entered from Highway No. 40 by means of a road leading north from the main highway and crossing the railway track. The distance from the north edge of the highway to the south rail of the track is 71½ feet. This railway crossing was marked by the standard railway crossing sign, located seventeen feet south of the south rail, at the east edge of the highway as it passed north at right angles from Highway No. 40. The contour of the ground is generally level, so that an occupant of an automobile turning north from the main highway toward the railway crossing onto the highway leading toward the entrance of the college grounds, has an unobstructed view of a railroad train approaching from the east for a distance of more than 2,000 feet.

The Andlauers were traveling west on Highway No. 40, in a closed automobile, intending to drive into St. Marys College grounds, their son being a student at the college. After turning north, leaving Highway No. 40, and as they passed onto the railway crossing, they were struck by a west-bound passenger train and almost instantly killed.

The accident occurred about 3:30 in the afternoon, on a clear day. Andlauer and his wife were both familiar with the crossing. As they turned north, approaching the crossing, they were travelling at a speed estimated at from twelve to fifteen miles an hour, and did not slacken nor increase that speed, so far as the record shows. There was evidence that the train was travelling from fifty to sixty miles an hour, and there was testimony of two witnesses to the effect that they did not hear the crossing whistle sounded. There was also evidence that the train

[fol. 65] was about an hour late, and that it usually slowed down to from twenty-five to thirty miles an hour in passing by the St. Marys College property.

St. Marys is a town of about 1,200 inhabitants, and there is a student body at the college of from 500 to 1,000 students, and a faculty of about 100, all of whom, we assume, lived on the campus in dormitories, although that is not very clear from the record. An ordinance of the City of St. Marys limits the speed of trains within the city limits to twenty miles an hour, fixing as a penalty for the violation of the ordinance a fine of not less than $25.00, nor more than $100.00.

When the plaintiff rested, defendant interposed a motion for a directed verdict, moving in the alternative for a directed verdict or a dismissal upon the merits. The court granted defendant's motion in the alternative, and dismissed the petition on its merits. To this action of the court plaintiff excepted "for the reason that under the pleadings and the evidence the plaintiff was entitled to recover and was entitled to have the cause submitted to the jury." The exception was allowed, and the case has been removed to this court by appeal.

In effect the negligence charged is (1) failure to sound any warning of the approach of the train, either by the ringing of a bell or the sounding of a whistle, after knowledge that the automobile in which the Andlauers were riding was approaching a position of peril; (2) failure to observe a custom theretofore observed by it, to slow down its trains when passing St. Marys College and entering the city limits of St. Marys; and (3) failure to ring any bell or sound any whistle within eighty rods of the crossing. It is the contention of plaintiff that he was entitled to go to the jury on each of these issues.

Defendant contends that (1) the evidence was insufficient to raise an issue as to the allegations of primary negligence; (2) that plaintiff's intestates were guilty of such contributory negligence as precludes recovery; and (3) that the doctrine of discovered peril or last clear chance was not applicable because there was no evidence that the defendant's employees discovered the peril in time to have avoided the accident.

[fol. 66] In our view of the case it is not necessary to consider the debated question as to whether there was sufficient

evidence of primary negligence to entitle plaintiff to have that issue submitted to the jury, because it seems clear, under the undisputed evidence, that Mr. and Mrs. Andlauer were both guilty of contributory negligence. We, therefore, assume, without deciding, that the evidence on the question of primary negligence was such as to entitle plaintiff to have had that issue submitted to the jury. As has been observed, the accident occurred in broad daylight, on a clear afternoon. The view toward the east was unobstructed, and had either of the occupants of the car looked toward the east as they approached this crossing, he could not but have seen the approaching train. It appears that the car in which the Andlauers were riding, was travelling at a speed of from ten to twelve miles an hour from the time it left the main highway and approached the crossing, and during that time the speed neither decreased nor increased; the car neither stopped nor turned aside. These are undisputed physical facts. It was their duty to look and listen as they approached this crossing, at such time and place as looking and listening would be effective. This crossing was a point of danger, with which they were both familiar. Certainly, the contributory negligence of the driver cannot be denied.

It is argued, however, that the negligence of the driver should not be imputed to Mrs. Andlauer, as she was a mere passenger or guest. We need not determine whether, under the facts and circumstances disclosed by this record, the negligence of Mr. Andlauer should be imputed to his wife, because this court has consistently held to the rule that it is the duty of one riding in an automobile, even though he is not the driver, to keep a lookout at railway crossings and give warning to the driver. Bradley v. Missouri Pacific R. Co., (C. C. A. 8) 238 Fed. 484; Noble v. Chicago, M. & St. P. Ry. Co., (C. C. A. 8) 298 Fed. 381; Chicago & E. I. Ry. Co. v. Sellars, (C. C. A. 8) 5 Fed. (2d) 31; Kutchma v. Atchison, T. & E. F. Ry. Co., (C. C. A. 8) 23 Fed. (2d) 183; Parramore v. Denver & R. G. W. R. Co., (C. C. A. 8), 5 Fed. (2d) 912. See also: Summers v. Denver Tramway Corp., (C. C. A. 10) 43 Fed. (2d) 286; Garrett v. Pennsylvania R. Co., (C. C. A. 7) 47 Fed. (2d) 10.

In Bradley v. Missouri Pacific R. Co., supra, the facts were very similar to those in the instant case. In that case [fol. 67] Mr. Bradley was riding in an automobile driven

by a Mr. Brown. At a point forty feet east of the railway crossing the approaching train was visible for a distance of 800 feet. Both occupants of the car were killed, and there was no direct testimony as to the care exercised either by the driver or by Mr. Bradley. Both, as in the case at bar, were familiar with the crossing. This court held that Bradley, even though merely a guest, was conclusively shown by the record to have been guilty of contributory negligence. In the course of the opinion by Judge Kenyon it is said:

"Here the hazard was brought about as much by Bradley's negligence as by Brown's. We think the question of contributory negligence here was one of law for the court, as the evidence relating thereto was undisputed, and but one conclusion can be drawn therefrom by reasonable minds, and that is that Bradley was guilty of contributory negligence, and the court would have been justified in so holding as a matter of law."

The doctrine of the Bradley case was reaffirmed by this court in Noble v. *Chicago, M. & St. P. Ry. Co.*, supra. In that case, which involved the question of contributory negligence of a passenger, it is said:

"The negligence of the driver of a car is not always, or necessarily, imputable to the passenger; but, outside the conduct of her husband, we think, on this record, that the plaintiff was equally guilty of contributory negligence. Admittedly she had a better opportunity than her husband to observe the train and in sufficient time to warn him. This she did not do, and is therefore guilty of contributory negligence as a matter of law."

Referring again to the facts in the instant case, it is observed that when the car turned north, approaching the crossing, it was 71½ feet from the south rail. Mrs. Andlauer was on the right side, in the front seat, and, as in the Noble case, had a better opportunity of observing the approaching train than her husband, who was at the wheel. But it is argued that in the absence of evidence, we must presume that she was in the exercise of reasonable care. If so, we should presume that she looked, and, of course, if she looked, she must have discovered the approaching train. If we may pursue the line of presumption further,

[fol. 68] in violation of the rule that one presumption cannot be based upon another presumption, we should presume that she warned her husband. Then there is a presumption that he exercised ordinary care. There are two answers to the argument based upon presumption. First, one presumption cannot be based upon another presumption. Brady v. United States, (C. C. A. 8) 24 Fed. (2d) 399; General Reinsurance Corp. v. Southern Surety Co., (C. C. A. 8) 27 Fed. (2d) 265; Lincoln National Life Ins. Co. v. Erickson, (C. C. A. 8) 42 Fed. (2d) 997. Second, a presumption cannot be weighed as against evidence, and does not constitute affirmative proof. In the absence of evidence, a presumption of fact may prevail. It takes the place of evidence; but when there is evidence on an issue, presumption as to that issue disappears. United States v. LeDuc, (C. C. A. 8) 48 Fed. (2d) 789; Guaranty Trust Co. v. Minneapolis & St. L. R. Co., (C. C. A. 8) 36 Fed. (2d) 747; Fidelity & Casualty Co. v. Niemann, (C. C. A. 8) 47 Fed. (2d) 1056.

Here, the physical facts and surrounding circumstances, all practically undisputed, would seem conclusively to show that the occupants of this car, heedlessly, and without looking or listening, drove onto this crossing without any knowledge of the approach of the train. They knew that they were approaching the crossing; they knew exactly where they were and where the crossing was. They had an unobstructed view of the approaching train, yet the car neither stopped, slackened its speed, increased its speed, nor turned to the right nor to the left, but went steadily forward. These physical facts and surrounding circumstances overcome all presumption as to the exercise of ordinary care, and conclusively establish that both the occupants of this car were guilty of contributory negligence, unless, as contended by appellant, the doctrine of discovered peril can be invoked.

It is argued that the defendant's employees in charge of the train, in the exercise of ordinary care, should have discovered the peril of plaintiff's intestates in time to have averted the accident. There are at least two answers to this contention. First, the evidence is not such as to charge the employees in charge of the train, with knowledge that the Andlauers were intending to drive onto this crossing. Certainly, until the car turned north toward the crossing, the employees were not charged with knowledge of their

[fol. 69] presence. They were warranted in assuming that these people would exercise ordinary care, that they knew they were approaching a crossing, and that the train was approaching a crossing. With this knowledge, they may well have assumed that the automobile would be stopped before it passed onto the crossing. If employees of the Railroad Company could not so assume, then it would be necessary to stop the train at every highway crossing, wherever situate, or to approach it at such a speed as to be able to stop the train whenever the train crew observed anyone approaching a crossing. If this train were going at as high a rate of speed as contended, it certainly could not have been stopped within several hundred feet; whereas, the automobile, travelling at a speed of from twelve to fifteen miles an hour, could have been stopped almost instantly. Second, the doctrine of discovered peril or last clear chance is not applicable because there is no proof that the employees operating the train had knowledge of the peril. This court has consistently held that such knowledge must be actual. It is bottomed on the theory that after the actual discovery of a person in peril, there is time within which, by the exercise of ordinary care, to avoid the injury. In the instant case, there is no evidence that the employees actually discovered decedents' peril. Certainly, there is no evidence that they discovered such peril in time to have avoided the accident. Marshall v. Hines, (C. C. A. 8) 271 Fed. 165; Miller v. Canadian Northern Ry. Co., (C. C. A. 8) 281 Fed. 664; Wheelock v. Clay, (C. C. A. 8) 13 Fed. (2d) 972; Walker v. East St. Louis & S. Ry. Co., (C. C. A. 8) 25 Fed. (2d) 579; Kinney v. Chicago Great Western R. Co., (C. C. A. 8) 17 Fed. (2d) 708.

In Marshall v. Hines, supra, this court said:

"The plaintiff's definition of the last clear chance doctrine is too broad and erroneous. The exception it presents is limited to cases in which the defendant actually discovers the person injured and his peril in time to avoid the injury. It does not include cases where, by the exercise of ordinary care, the plaintiff might have made such a discovery in time to avoid the injury."

In the instant case, the Railroad Company produced no testimony and there was no evidence that the engineer or

fireman, or any other employees in charge of the train, discovered the Andlauers or their peril before they were in- [fol. 70] jured, and hence, the exception to the rule of contributory negligence cannot be invoked.

It is finally urged that the court erred in granting the alternative motion to dismiss the case, instead of directing a verdict. When defendant's motion was submitted, no objection was made to its form, and in the exception taken by plaintiff to the action of the court granting the motion, no complaint was made that the procedure invoked was objectionable. Had such an objection or exception been taken at the time, the procedure could readily have been cured. The objection is purely technical and could not possibly have prejudiced the plaintiff. What is said by this court in Bowman v. Atchison, T. & S. F. Ry. Co. (C. C. A. 8) 184 Fed. 697, is here apposite. It is there said:

"The court sustained the motion for a directed verdict and added: 'Enter judgment for the defendant as on the verdict of the jury.' No verdict of the jury appears in the record, and the fair inference is the court dispensed with one. The plaintiff excepted generally to the ruling and the final judgment, but the court was not informed that complaint was made because a verdict was not taken in conformity with the ruling of the motion. And, though it is made the subject of assignments of error, they are not relied on in the brief. Our attention is, however, directed to the practice. We agree with counsel that the practice is objectionable. A serious question would have been presented had the trial court been distinctly advised that exception was taken to it and an opportunity given to correct it."

In a later case, Wear v. Imperial Window Glass Co., (C. C. A. 8) 224 Fed. 60, in an opinion by the late Judge Sanborn, it is said:

"There is another reason why no reviewable question of law is presented to this court in this case. A trial court is entitled to a clear specification by exception of any ruling or rulings which a party challenges and desires to review, to the end that the trial court itself may correct them if so advised, and, if it fails to do so, that there may be a clear record of the rulings and the challenges thereof. For this

purpose a rule has been firmly established that an exception to any ruling which counsel desire to review, which sharply calls the attention of the trial court to the specific error alleged, is indispensable to the review of such a ruling."

[fol. 71] If there was even a technical error, it was waived, and cannot be considered by this court. See, also: United States v. United States Fidelity & Guaranty Co., 236 U. S. 512; Fillippon v. Albion Vein Slate Co., 250 U. S. 76. The rule is a just one and affords an opportunity, both to the trial court and opposing counsel, to correct the error, which in the instant case goes only to matters of form; and it enables the appellate court to determine what questions were actually presented to the lower court.

We conclude that the court correctly directed a verdict for the defendant on the ground of contributory negligence, and the judgment appealed from is affirmed.

[File endorsement omitted.]

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS
EIGHTH CIRCUIT

No. 9554

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, Deceased, Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation

JUDGMENT—February 20, 1933

Appeal from the District Court of the United States for the Western District of Missouri

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Dis-

trict Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Union Pacific Railroad Company, a Corporation, have and recover against William Miller, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, deceased, the sum of Twenty Dollars for its costs herein and have execution therefor.

[fols. 73-85] Petition for rehearing, covering 13 pages, filed March 21, 1933, omitted from this print. It was denied, and nothing more by Order of March 24, 1933.

[fol. 86] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—March 24, 1933

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellant.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

In United States Circuit Court of Appeals

Motion to Stay Mandate—Filed April 1, 1933

Appellant respectfully states that his counsel are engaged in the preparation of an application for a writ of certiorari to present as soon as the same is ready to the Supreme Court of the United States to review the record in the above entitled cause and for said reason the said appellant respectfully prays this Honorable Court to order that the mandate herein be stayed pending the disposition of said application for certiorari in said cause.

William Buchholz and Martin J. O'Donnell, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 87] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—April 4, 1933

On consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 88] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 89] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,643. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 51. William Miller, administrator of the estates of Marcus Andlauer and Ellanore Andlauer, petitioner, vs. Union Pacific Railroad Company. Petition for a writ of certiorari and exhibit thereto. Filed May 8, 1933. File No. 51, O. T., 1933.

FILE COPY

Office Supreme Court, U. S.
FILED
MAY 8 1933
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

October Term, 1932.

No. [redacted]6 51

WILLIAM MILLER, Administrator of the estates of Marcus Andlauer and Ellanore Andlauer, deceased, *Petitioner,*

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO

In the

Supreme Court of the United States

October Term, 1932.

No. ——.

WILLIAM MILLER, Administrator of the estates of Marcus Andlauer and Ellanore Andlauer, deceased, *Petitioner*,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Supreme Court of the United States:

Your petitioner respectfully says:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Ellanore Andlauer, aged thirty-five, the mother of three children, and her husband, Marcus, while riding in the

family automobile, driven by the husband, an experienced driver, were killed on a much traveled public railroad crossing on December 11, 1927, at St. Marys, Kansas.

Petitioner is the administrator of the estates of Marcus Andlauer and his wife, Ellanore Andlauer. He instituted this action in a Missouri State court to recover for the wrongful death of the decedents, as authorized by Section 60-3203, R. S. Kansas 1923. The action was removed to the trial court by respondent on the ground of diversity of citizenship (Tr. 4-7). The cause was tried on an amended petition in two counts (Tr. 8-16) and answer (16-21) and reply (Tr. 21-22). Respondent operates a railroad westwardly through St. Marys, Kansas. St. Marys is an incorporated town of about twelve hundred inhabitants. St. Mary's College adjoins the town on the east. There is a student body at the college from five hundred to one thousand and a faculty of about one hundred, all of whom lived on the campus in dormitories. Exhibit 1 (Tr. 30) is a plat showing the location. The entrance to the college is marked by the regular railroad crossing sign, and is a public and much used crossing. Throughout the years it was much used on Sunday afternoons by the relatives of the students driving in to see their sons. The intersection, as admitted in the answer, was visible to the trainmen for more than a mile to the eastward as they approached the same (Tr. 18-20). The train was also visible to persons in the situation of the decedents, while turning towards, driving towards and moving on the crossing. There was no obstruction to the vision of either party. State Highway 40 parallels the track to the south. The south rail of the track is 71½ feet from the north edge of the highway at the crossing. On December 11, 1927, the decedents left their home in

Topeka and drove west on Highway No. 40 to see their son at the college. The deceased were both familiar with the crossing. When they got opposite the college entrance the automobile turned to the north and traveled without changing speed, estimated at from 10 to 15 miles an hour, from the highway to and upon the railroad track. When the rear wheels of their automobile got on the south rail (Tr. 51) respondent's train struck the automobile and carried it a distance of 1,752 feet to the west (Tr. 51, 31). When the train stopped, the automobile was still on the cowcatcher and Mr. Andlauer was dead and Mrs. Andlauer so injured that she almost instantly died. Resonent's train was a regular passenger train from Kansas City. It was nearly two hours late (Tr. 51). It passed the college grounds at a speed estimated by witnesses of from 55 to 60 miles per hour. The evidence showed that at said speed it could be stopped within 1,000 feet (Tr. 54). No whistle was blown or other warning given by the trainmen. A Kansas statute required respondent's trainmen to blow the whistle 80 rods east of the crossing. The statute made the failure to blow the whistle a crime. The city limit of St. Marys was 85 feet west of the crossing (Laws of Kansas 1925, p. 275). An ordinance prohibited the operation of trains in excess of twenty miles per hour (Tr. 56). A custom had theretofore been observed by respondent's trains when passing the college grounds to slow down to from twenty-five to thirty miles an hour (Tr. 51). The wrongdoing on the part of the respondent charged in the amended petition and established by the evidence is here reproduced:

> "—that defendant was negligent in that it operated its said train in a westwardly direction past the said college through said thickly populated and traveled vicinity and over the said intersecting northbound

public road at a high, dangerous and excessive rate of speed; that the said defendant was negligent in that it failed to sound any warning of the approach of the said train, notwithstanding the said defendant knew, and by the exercise of ordinary care could have known, and had notice and knowledge, that the said automobile in which the said deceased was riding and the said deceased was approaching and in a position of peril while turning towards and moving towards and moving on the said track, in time, by the exercise of ordinary care, in the use of the means at the command of the said defendant, to have avoided the collision and injury to the deceased, either by giving warning of the approach of the said railroad train or by slackening the speed thereof, or by stopping the said train, but that the said defendant negligently neglected so to do; that the defendant was also negligent in that contrary to a custom theretofore observed by it to slow down its trains when passing the said college and entering the said city of St. Marys, the said defendant negligently omitted to observe and follow the said custom and proceeded as aforesaid at said high, dangerous and excessive rate of speed; that defendant was also negligent in that it failed to ring any bell or sound any whistle when within eighty (80) rods of the said crossing and while approaching the said crossing."

Respondent's answer omitted a general denial. It contained specific denials. It did not deny the allegation that the automobile and deceased therein were in peril while turning toward and driving toward and driving on the crossing. The answer attempted to deny knowledge of the peril, but was ineffective for that purpose as it failed to comply with the Missouri statute, Section 776, R. S. Mo. 1929, requiring the answer to generally or specifically deny each material allegation of the petition

controverted by the defendant; or any knowledge or information thereof sufficient to form a belief. The answer alleged contributory negligence of both decedents in that they were unconscious of the approach of the train.

Under the Missouri Supreme Court decisions applying said statute the answer admitted the alleged peril and the knowledge thereof by defendant's trainmen. Though the evidence established the alleged peril and knowledge thereof, it was unnecessary to show by the evidence what was admitted by the answer under the state decisions. The cause was called for trial in February, 1932. Petitioner offered evidence tending to prove the foregoing facts. At the conclusion of the evidence respondent prayed the court to dismiss the plaintiff's case, with prejudice. This motion was sustained and a judgment dismissing the cause with prejudice was entered of record, all without petitioner's consent. The fact issues raised by the pleading were determined by the trial judge and were not submitted to the jury, either by peremptory instruction or otherwise. From this judgment petitioner appealed to the Circuit Court of Appeals for the Eighth Circuit. That court filed its opinion on February 17th, 1933 (Tr. 62-69) and on February 20, 1933, rendered its judgment of affirmance (Tr. 69-70).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The Seventh Amendment commanding that "In suits at common law where the matter in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved" was ignored by the Court of Appeals in affirming the act of the trial judge in dismissing plaintiff's case at the close of the evidence, contrary to the decisions of this court in *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, and cited cases, and contrary to the decision of the Circuit Court of Appeals for the First Circuit in the case of *Langnes* v. *Gorton Pew Vessels Co.*, 59 Fed. (2d) 315.

II.

The Court of Appeals determined that plaintiff was not entitled to recover on either count, notwithstanding the failure to slow down while passing the college grounds to twenty-five or thirty miles per hour, in accordance with the custom, and notwithstanding the fact that decedents proceeded over the crossing on the assumption that the custom would be observed. Had it been observed the automobile would have been 80 feet north of the track when the train reached the crossing. The failure of the court below to give effect to the custom to relieve deceased from the imputation of contributory negligence as a matter of law conflicts with the law as declared in *Farrell* v. *Ry.*, 138 Fed. 28 (C. C. A. 2) and with the general law on the question as stated in Sec. 1669, Thompson on

Negligence, and same section in both of White's Supplements to said work.

III.

The Court of Appeals determined that deceased were guilty of contributory negligence as a matter of law, notwithstanding respondent's trainmen failed to comply with the custom and the statute requiring a whistle to be blown and notwithstanding the almost direct approach of the train prevented the deceased from knowing of the extraordinary and reckless speed and notwithstanding a warning whistle would have advised deceased of the fast approach and caused the automobile to stop before the collision. Before the court could hold Marcus Andlauer guilty of contributory negligence as a matter of law it would have to find that he knew of the unusual speed at which the train approached. Before it could hold Ellanore Andlauer likewise guilty it must find she had like knowledge and also that her experienced husband was not exercising due watchfulness and care. The decision conflicts with the general law on the subject.

IV.

The decision holding Ellanore Andlauer guilty of contributory negligence as a matter of law conflicts with the decisions of the Circuit Court of Appeals for the Ninth Circuit, in the following cases:

Southern Pac. Ry. Co., 248 Fed. 261;
Trenholm v. *Ry. Co.*, 8 Fed. (2d) 452;
Southern Pac. Ry. Co. v. *Stephens*, 24 Fed. (2d) 182.

The decision on said point also conflicts with the decision of the Court of Appeals for the Seventh Circuit in *Ry.* v. *Divine*, 39 Fed. (2d) 537.

The Court of Appeals for the Ninth Circuit in *Trenholm* v. *Ry.*, 8 Fed. (2d) 452, expressly holds that the decision by the 8th Circuit in *Bradley* v. *Ry.*, 288 Fed. 484, followed and applied herein conflicts with the rule on the same question applied in the Ninth Circuit and with "the weight of authority."

V.

The decision of the court below that the trainmen could assume that the automobile would stop before going on the track was conditioned upon the giving of a warning of the unusually fast approach of the train and the opinion below on said point conflicts with those of this court in *Continental Ry. Co.* v. *Stead*, 95 U. S. 161, and *Texas & Pacific Ry. Co.* v. *Cody*, 166 U. S. 660, holding that the train "is bound to give due warning of its approach so that the wagon may stop and allow it to pass." The assumption that the train was coming at the usual rate of speed lulled the deceased into feeing that they could safely cross and made the warning imperative.

VI.

The Court of Appeals failed to hold that the respondent's trainmen in driving over the much used public crossing at the excessive rate of 55 or 60 or 90 miles per hour at an unusual time, contrary to the custom to slow down to 25 or 30 miles per hour while passing the college grounds, and into the city of St. Mary's in viola-

tion of its ordinance limiting the speed to 20 miles per hour, and committing a crime by violating the statute requiring the warning for the crossing and without any warning, exhibited such gross disregard for the rights of others and the public generally as to warrant an inference of wanton negligence or conscious indifference to consequences so as to deprive the respondent of the defense of alleged contributory negligence and this contrary to the general law on the question as stated in Secs. 20, 22, Thompson on Negligence, and wealth of cases in *Breme* v. *Ry. Co.*, 318 Ill. 1, l. c. 17.

VII.

The statement of the last chance rule by the court below is in conflict with that of this and every other court on the question with reference to travelers in peril approaching and on highway crossings. That statement is (Tr. 67):

> "* * * the doctrine of discovered peril or last clear-chance is not applicable because there is no proof that the employees operating the train had knowledge of the peril. This court has consistently held that such knowledge *must be actual.* It is bottomed on the theory that after the actual discovery of a person in peril, there is time in which by the exercise of ordinary care, to avoid the injury. In the instant case, there is no evidence that the employees actually discovered decedent's peril.
>
> * * * * * *
>
> The exception (last chance doctrine) is limited to cases in which the defendant actually discovers the person injured and his peril in time to avoid the injury. *It does not include cases where, by the exercise of ordinary care, the plaintiff might have made such discovery in time to avoid the injury.*"

This statement of the rule conflicts with the statement thereof in *Ellzey* v. *Kansas City Southern Ry. Co.*, 275 U. S. 236, and in *Porto Rico L. & P. Co.* v. *Miranda*, 62 Fed. (2d) 479 (C. C. A. 1), stating the doctrine under the authority of this court in the Ellzey case (which it cites) thus:

> "* * * the last clear chance doctrine applies, although the defendant may not have seen and known of the dangerous situation of the plaintiff, if circumstances existed from which he should have anticipated the presence of plaintiff at the place of the accident and in the exercise of reasonable care could have seasonably avoided an accident."

The statement of the rule below also conflicts with that in *Tutwiler* v. *Lowery*, 279 Fed. 479 (C. C. A. 6), where the court decides that this court had never held that actual knowledge of the peril was necessary. It also conflicts with *Robinson* v. *Ry. Co.*, 112 Fed. 484 (C. C. A. 6), the late Justices Lurton and Day sitting; *Texas & P. Ry.* v. *Nolan*, 62 Fed. (C. C. A. 5), where the court held that the first statement of the doctrine in *Davies* v. *Mann*, 10 Mees & W. 456, was in conflict with that below, to-wit: that the doctrine applied because:

> "The servant of defendant either saw animal *or could have seen him in time to have avoided the injury if he had moderated his pace to a careful one.*"

It is also in conflict with *Railway* v. *Klutt*, 148 Fed. 818 (C. C. A. 6), certiorari denied, 204 U. S. 672.

It is also in conflict with the statement in a highway crossing case by the late Chief Justice Taft in 85 Fed. 413 (C. C. A. 6), Justice Lurton concurring.

It also conflicts with the now leading decision on the question in the British Empire. See *British Columbia Electric Ry. Co.* v. *Loach*, (1916) A. C. 719; 10 British Ruling Cases 882, and with the opinions of the late Chief Justice Anglin, of Canada, in *Columbia Bithulithic Company* v. *British Columbia Electric Co.*, 55 Canada Supreme Court 1, and *Brenner* v. *Toronto Ry. Co.*, 43 Ont. L. Rep. 423.

VIII.

The statement by the court below that:

> "In the instant case, the Railroad Company produced no testimony and there was no evidence that the engineer or fireman, or any other employees in charge of the train discovered the Andlauers or their peril before they were injured, and hence the exception to the rule of contributory negligence cannot be invoked"

is, in effect, a decision formulating a new rule upon an important question of law, to-wit: That unless the perpetrator of a wrong admits it, it cannot be proven by facts and circumstances. This is contrary to the general rule on the question, and to the rule in the state where the cause was tried made applicable by the Conformity Act. (*Lynch* v. *Railroad*, 208 Mo., l. c. 21, also l. c. 24.) There it is said:

"Knowledge, like actual notice, may be proved by direct evidence, or it may be inferred from facts and circumstances." There the court held that the fact that the track was unobstructed for two-thirds of a mile, on a clear day, authorized the jury to infer actual knowledge of the peril on the part of the trainmen. The jury herein could infer that the trainmen actually saw the automobile and the peril from the fact that there was no ob-

struction, the day was clear, and no change in the speed of the automobile. (*Chapman* v. *Ry.*, 217 Mo. App. 312, Syll. 5.) The jury could infer that one blast of the whistle would have stopped the automobile and saved deceased.

> "It is not always necessary to show the train could have been *stopped* by those in charge by the exercise of ordinary care in order to invoke the humanitarian (or last chance) doctrine a failure to stop, slow down or *warn* by bell or whistle may be sufficient to invoke the doctrine. (*Chapman* v. *Ry.*, 217 M. A., l. c. 324.)"

The ruling of the court on this question is in conflict with the law everywhere.

The ruling of the court below as to whether the trainmen had actual knowledge under the evidence conflicts with the opinion of this court in *Grand Trunk Railway Company* v. *Ives*, 144 U. S. 408, holding that

> "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only when the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

IX.

Under the construction given to the statute giving this court jurisdiction on certiorari to review decisions of the Circuit Courts of Appeals, as stated by Justice Brewer in *Forsyth* v. *Hammond*, 166 U. S. 506, to-wit:

> "Nine separate appellate tribunals might by their difference of opinion, unless held in check by the reviewing power of this court create an unfortunate confusion in respect to the rules of Federal decision."

And as stated by Chief Justice Taft in *Magnum* v. *Coty*, 262 U. S. 159, it is said:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort."

And as stated in Rule 38 of this court, this is a case peculiarly calling for the exercise of the discretion vested in this court by the statute to issue the writ prayed for. A resume of the reasons is:

1. Conflict between the opinion below and that of this court on an important question, to-wit: whether the command of the Seventh Amendment shall be longer observed by the Federal Courts.

2. Conflict between the opinion below and that of another circuit and the general law on an important question, to-wit: whether an error of judgment caused by a defendant's negligence can be disposed of as a question of contributory negligence as a matter of law.

3. Conflict between the opinion below and those of other circuits on an important question, to-wit: whether a wife riding with her competent husband must take control of the driver and act on the assumption that he is neglecting his duty without any knowledge on her part that he is not.

4. Conflict between the opinion below and that of this court, the courts of the other circuits, and the English and Canadian courts on an important question, to-wit: whether the last chance doctrine applies at highway crossing much used by the public in populous vicinities and

not in the open country and where trainmen have no right to expect a clear track but must anticipate the presence of the public unless the evidence shows actual knowledge of the presence and peril of an injured person in time to save him or whether negligent failure to discover the presence and peril is sufficient to establish liability.

Wherefore, your petitioner prays that a writ of certiorari under the seal of this court directed to the United States Circuit Court of Appeals for the 8th Judicial Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the 8th Circuit and of the case numbered and entitled on its docket No. 9554, At Law, *William Miller, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, Deceased, Appellant,* v. *Union Pacific Railroad Company, a corporation, Appellee,* to the end that cause may be reviewed and determined by this court as provided for by the statutes of the United States and that the judgment of the United States Circuit Court of Appeals for the 8th Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Dated May 4, 1933.

WILLIAM MILLER, *Administrator of the estates of Marcus Andlauer and Ellanore Andlauer, deceased, Petitioner,*

By WILLIAM BUCHHOLZ,
MARTIN J. O'DONNELL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals for the 8th Circuit is reported in 63 Fed. (2d) 574, and at pages 62 to 69 of the record.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is February 20, 1933. A petition for a rehearing was filed in accordance with the rule of said Circuit Court of Appeals and denied on the 24th day of March, 1933.

2. The statutory provision which is believed to sustain the jurisdiction of this court is the following: Sec. 347, 28 U. S. C. A., providing:

> "—in any case, civil or criminal, in a Circuit Court of Appeals * * * it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after a judgment or decree of such lower court that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal." (Which said statute in its present form was adopted February 13, 1925, 43 Stat. 938.)

III.

Statement of the Case.

This has already been stated in the preceding petition in I (page 15). It is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The court erred in holding that the judge of the trial court, without the consent of petitioner, at the close of all the evidence, committed no error in rendering a judgment dismissing plaintiff's case, and in holding that the objection to the judgment as to such act was purely technical, and that petitioner's right to a trial by jury was not a matter of substance, but a matter of form.

2. The court erred in holding that petitioner had no right to recover on Count I of the petition.

3. The court erred in holding that petitioner had no right to recover on Count II of the petition.

4. The court erred in holding that Ellanore Andlauer was guilty of contributory negligence, as a matter of law.

5. The court erred in holding that Marcus Andlauer was guilty of contributory negligence, as a matter of law.

6. The court erred in holding that the petitioner could not recover on either count, under the rule of law known as the last chance rule.

7. The court erred in holding that the petitioner could not recover under the last chance doctrine (where the

trainmen had no right to expect a clear track) unless there was evidence showing actual knowledge on the part of the trainmen of the position of peril of the deceased.

8. The court erred in holding that there was no evidence in the record from which the jury could infer that the trainmen had actual knowledge of the peril of the deceased.

9. The court erred in holding that the conduct of the trainmen exhibited such conscious indifference to the rights of the public as to deprive respondent of the defense of contributory negligence.

ARGUMENT.

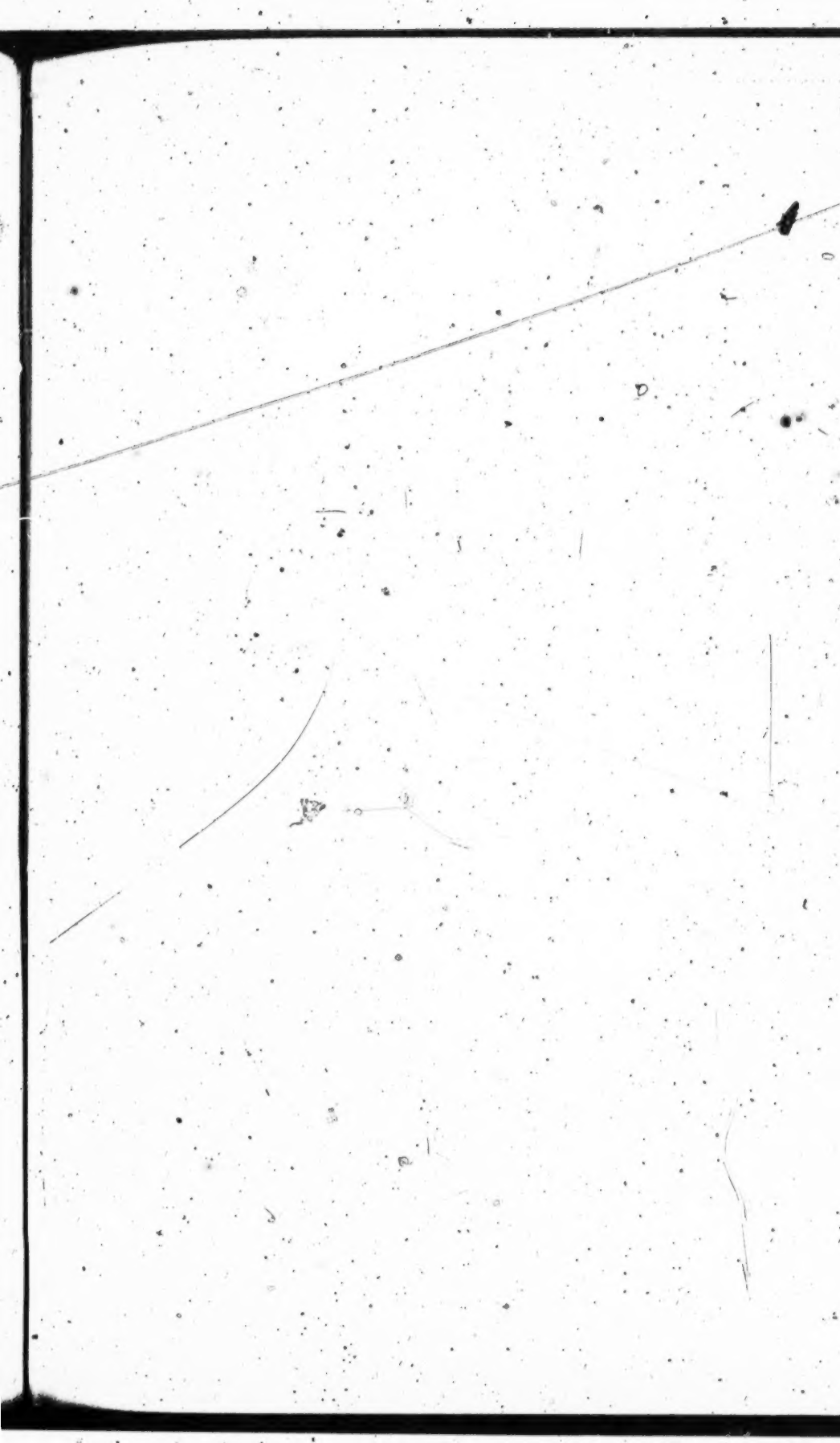
The reasons given in the petition for the writ, pages 6-13, together with those set forth in the motion for a rehearing (Tr. 71-82), so plainly state the position of the petitioner and show his right to have the writ prayed for issued that he waives argument.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, in order that justice be done herein and that the conflicts on the important questions herein involved be corrected and that to such end a writ of certiorari should be granted and this court should review the decision of the United States Circuit Court of Appeals for the Eighth Judicial Circuit and finally reverse it.

Respectfully submitted,

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioner.



FILE COPY

No. 51.

In the Supreme Court of the United States

October Term, 1933.

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, *Petitioner*,

vs.

UNION PACIFIC RAILROAD COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER.

WILLIAM BUCHHOLZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

INDEX.

	PAGE
Statement of the Case	1-7
Respondent Answered Separately to the Separate Counts	4
Specification of Errors	8
Summary of the Argument	9-19
Argument	20-76
The court erred in holding that petitioner had no right to recover on Count I of the petition for the wrongful death of Mrs. Andlauer. Said holding is in conflict with the rulings of this court denying certiorari in Southern Pac. Co. v. Trenholm, 270 U. S. 649, and Chicago & Eastern Illinois Ry. Co. v. Divine, 281 U. S. 765, and with the weight of authority on the question	20
The court erred in holding that petitioner had no right to recover on both counts of the petition. Said holding is in conflict (a) with the authorities holding that driver had a right to proceed on the assumption that the custom to slow down would be observed; (b) with the authorities holding that under the facts and circumstances it was the function of the jury to say whether he was at fault; (c) with the authorities holding that under the antecedent negligence, humanitarian or last chance theories of the law the case should have been submitted to the jury; (d) with the authorities holding that the trainmen were guilty of conduct equivalent to wantonness	28
The last chance rule as stated by the Court of Appeals only applies to trespassers or others for whom the trainmen are not required to keep a lookout and as stated and applied by said court there is a conflict with the general law on the question necessitating reversal	49

PAGE

The foregoing considerations and the facts found by the Court of Appeals demonstrate that the case could have been submitted to the jury on the ultimate negligence or last chance doctrine.... 74

As to Excessive Speed..... 46

Table of Cases Cited.

Allen v. Purvis, 30 S. W. (Mo.) (2d) 196, l. c. 199, 200 53

A. T. & S. F. Ry. v. Sanders, 22 Kan. 1..... 31

Baker v. Ry. Co., 248 N. Y. 131..... 25

B. & O. Ry. v. Anderson, 85 Fed. 413 (C. C. A. 6)....10, 38

Barthelmas v. Ry., 225 Penn. St. 597..... 34

Bradley v. Ry., 288 Fed. 484.....15, 20

Breme v. Ry. Co., 318 Ill. 1, l. c. 17..... 16

Brenner v. Toronto Ry. Co., 13 Ont. L. Rep. 423.....11, 40

British Columbia Elec. Co. v. Loach, 1916 A. C. 719, 10 British Ruling Cases 882, l. c. 892.....10, 40, 59, 60, 61

Broussard v. Louisiana Western R. Co., 140 La. 517, 73 S. 606 48

C. & O. Ry., 200 Ky., l. c. 505..... 36

C. & O. Ry. Co. v. Steele, 84 Fed. 93..... 44

Carr v. Pennsylvania R. R. Co., 225 N. Y. 44..... 34

Central of Ga. Railway v. Pope, 127 Southern 85..... 49

Chamberlain v. Lehigh Valley R. Co., 238 N. Y. 233.. 33

Chapman v. Railroad, 217 Mo. App. 312, l. c. 313, syllabi 5 .....11, 73

Chesapeake & Ohio Ry. Co. v. Steele (opinion by Lurton, J., 84 F. 93)..... 23

Chicago & E. I. Ry. Co. v. Divine, 39 F. (2d) 537..... 23

Chicago & Eastern Illinois Ry. Co. v. Divine, Administrator, 281 U. S. 765.....20, 24

Coaching Co. v. Tolson, 139 U. S. 551..... 40

Columbia Bithulithic Co. v. British Columbia Electric Co., 55 Canada Supreme Court 1.....10, 40, 60, 61

Continental Ry. Co. v. Stead, 95 U. S. 161..... 16

PAGE

Crouch v. New York Central R. R. Co., 260 N. Y. 227 25
Davies v. Mann, 10 Mees & W. 456 10
Detroit Southern R. Co. v. Lambert, 150 Fed. 555, l. c. 557 43
Ellzey v. K. C. S. Ry. Co., 275 U. S. 236 9
Farrell v. Ry., 138 Fed. 28 (C. C. A. 2) 14, 32
Gasoline Products Co., Petitioner, v. Champlin Refining Co., 283 U. S. 494, 501 18
Gregory v. Ry., 270 S. W. 621, l. c. 623 74
Grand Trunk Ry. Co. v. Ives, 144 U. S. 408 ..... 12, 32, 40
Herrell v. Ry., 322 Mo. 551, Sy. 1 45
Hines v. Moore, 124 Miss. 500, 87 S. 1 48
Horton v. Ry. Co., 237 N. Y. 38, l. c. 49 34
I. C. Co. v. Sollinger's Adm., 160 Ky. 455, l. c. 457 35
K. C. S. Ry. Co. v. Ellzey, 275 U. S. 236 ..... 38, 41
Kelly v. Director Gen. of Railroads, 274 Pa. 470 48
Langwa v. Gorton Pew Vessels Co., 59 Fed. (2d) 315 12
Lehigh Valley Ry. Co. v. Mangam, 278 Fed. 85, l. c. 88 44
Lynch v. Railroad, 208 Mo. 1, l. c. 21, 24 ..... 11, 73
McKenzie v. Ry., 216 Mo. 19 54
McMahan v. Ry. Co., 96 Kan. 271 39
Morris v. Railway, 27 Fed. (2d) 326 49
Nelson v. Nygen, 259 N. Y. 71 27
Norfolk, etc., R. Co. v. Holbrook, 27 F. (2d) 326 48
Nor. Pac. R. R. Co. v. Freeman, 174 U. S. 379 ..... 23, 43
Pederson v. Ry., 229 U. S., l. c. 153 13
Porto Rico L. & P. Co. v. Miranda, 62 Fed. (2d) 479 (C. C. A. 1) 9, 41
Railroad Co. v. Cook, 66 Fed. 119 38
Railroad Co. v. Van Dorp, 173 N. E. 445 48
Railroad v. Jackson, 130 So. 388 48
Railway Co. v. Arno, 67 Kan. 260 39
Railway v. Klutt, 148 Fed. 818 (C. C. A. 6) 10, 39
Revely v. Skinner, 33 Mo. 98, l. c. 100 ..... 17, 51, 52
Robinson v. Ry. Co., 112 Fed. 484 (C. C. A. 6) 10
Ry. v. Divine, 39 Fed. (2d) 537 15
Schrader v. N. Y. C. & St. L. Ry. Co., 254 N. Y. 148 35

PAGE

Southern Pacific Ry. Co., 248 Fed. 261 15
Southern Pac. Ry. Co. v. Stephens, 24 Fed. (2d) 182 15
Southern Pac. Co. v. D. P. Trenholm, as Administrator, etc, 270 U. S. 649 ..... 20, 22
Sphingett v. Ball, 4 F. & F. 472 58
State ex rel. v. Gilbert, 163 M. A., l. c. 683 18
State ex rel. Townsend v. Mueller, 330 Mo. 641, l. c. 647 52
Strauchon v. Ry., 232 Mo., l. c. 599 32
Texas & Pacific Ry. Co. v. Cody, 166 U. S. 660 16
Texas & P. Ry. v. Nolan, 62 Fed. (C. C. A. 5) 10
Trenholm v. Ry. Co., 8 Fed. (2d) 452 ..... 15, 20, 21
Tutwiler v. Lowery, 279 Fed. 479 (C. C. A. 6) 10, 39
Wall v. Int. Ry. Co., 233 N. Y. 309 34
Watson v. Hawkins, 60 Mo. 550 18
Weidlich v. N. Y. N. H. & H. R. R. Co., 93 Conn. 438 27
Wolosszznowski v. N. Y. C. R. R. Co., 254 N. Y. 206 58
Woods v. Moffitt, 38 S. W. (2d) 525, l. c. 528 54

Statutes Cited.

Section 60-3203, R. S. Kansas 1923 42
Section 648, R. S. U. S. 13
Section 649, R. S. U. S. 13
Section 776, R. S. Mo. 1929 ..... 17, 51

Text Books Cited.

Section 16, American Law Institute, Volume 10 ..... 55, 57
10 British Ruling Cases 882 10
Central Law Journal 215 75
2 Tidds Pr. 917 13
52 C. J. 266, 267 47
52 C. J. 468-469 48
Jones, Com. on Ev., Vol. 1, page 37 44
Laws of Kansas 1925, page 275 42
Secs. 20, 22, Thompson on Negligence 16
Section 1669, Thompson on Negligence 14, 15
Thompson on Negligence, Vol. VIII (White's Supplement), Sec. 1669 ..... 15, 32
Wigmore on Evidence 1068, 1071, Vol. 1 45

In the Supreme Court of the United States

October Term, 1933.

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, *Petitioner*,

vs.

UNION PACIFIC RAILROAD COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER.

No. 51.

STATEMENT OF THE CASE.

Ellanore Andlauer, aged thirty-five, the mother of three children, and her husband, Marcus, while riding in the family automobile, driven by the husband, an experienced driver, were killed on a much-traveled public highway over a railroad crossing on December 11, 1927, at St. Marys, Kansas.

Petitioner is the administrator of the estates of Marcus Andlauer and his wife, Ellanore Andlauer. He instituted this action in a Missouri State Court to recover for the wrongful death of the decedents, as authorized by Section 60-3203, R. S. Kansas 1923. The action was removed to the trial court by respondent on the ground of diversity of citizenship (R. 4-6). The cause was tried on an amended petition in two counts (R. 6-16), answer (R. 16-22) and reply (R. 22). Respondent operates a railroad westwardly through St. Marys, Kansas. St. Marys is an incorporated town of about twelve hundred inhabitants. St. Mary's College adjoins the town on the east. There is a student body at the college from five hundred to one thousand and a faculty of about one hundred, all of whom lived on the campus in dormitories. Exhibit 1 (R. 30) is a plat showing the location. The entrance to the college is marked by the regular railroad crossing sign, and is a public and much-used crossing. Throughout the years it was much used on Sunday afternoons by the relatives of the students driving in to see their sons. The intersection, as admitted in the answer, was visible to the trainmen for more than a mile to the eastward as they approached the same (R. 18). The train was also visible to persons in the situation of the decedents, while turning towards, driving towards and moving on the crossing. There was no obstruction to the vision of either party. State Highway 40 parallels the track to the south. The south rail of the track is 71½ feet from the north edge of the highway at the crossing. On December 11, 1927, the decedents left their home in Topeka and drove west on Highway No. 40 to see their son at the college. The deceased were both familiar with the crossing. When they got opposite the college entrance

the automobile turned to the north and traveled without changing speed, estimated at from 10 to 15 miles an hour, from the highway to and upon the railroad track. When the rear wheels of their automobile got on the south rail (R. 56) respondent's train struck the automobile and carried it a distance of 1,752 feet to the west (R. 56-31). When the train stopped, the automobile was still on the cowcatcher, Mr. Andlauer was dead and Mrs. Andlauer so injured that she almost instantly died. Respondent's train was a regular passenger train from Kansas City. It was nearly two hours late (R. 55). It passed the college grounds at a speed estimated by witnesses of from 55 to 60 miles per hour. The evidence showed that at said speed it could be stopped within 1,000 feet (R. 59). No whistle was blown or other warning given by the trainmen. A Kansas statute required respondent's trainmen to blow the whistle 80 rods east of the crossing. The statute made the failure to blow the whistle a crime (Laws of Kansas 1925, p. 275). The city limit of St. Marys was 85 feet west of the crossing. An ordinance prohibited the operation of trains in excess of twenty miles per hour (R. 61). A custom had theretofore been observed by respondent's trains when passing the college grounds to slow down to from 25 to 30 miles an hour (R. 55). The wrongdoing on the part of the respondent charged in the amended petition and established by the evidence is here reproduced:

> "* * * that defendant was negligent in that it operated its said train in a westwardly direction past the said college through said thickly populated and traveled vicinity and over the said intersecting northbound public road at a high, dangerous and excessive rate of speed; that the said defendant was negligent in that it failed to sound any warning of the approach

of the said train, notwithstanding the said defendant knew, and by the exercise of ordinary care could have known, and had notice and knowledge, that the said automobile in which the said deceased was riding and the said deceased was approaching and in a position of peril while turning towards and moving towards and moving on the said track, in time, by the exercise of ordinary care, in the use of the means at the command of the said defendant, to have avoided the collision and injury to the deceased, either by giving warning of the approach of the said railroad train or by slackening the speed thereof, or by stopping the said train, but that the said defendant negligently neglected so to do; that the defendant was also negligent in that contrary to a custom theretofore observed by it to slow down its trains when passing the said college and entering the said city of St. Marys, the said defendant negligently omitted to observe and follow the said custom and proceeded as aforesaid at said high, dangerous and excessive rate of speed; that defendant was also negligent in that it failed to ring any bell or sound any whistle when within eighty (80) rods of the said crossing and while approaching the said crossing.''.

Respondent answered separately to the separate counts.

Respondent's answer omitted a general denial. It contained specific denials, but not as to all of the allegations. It did not deny the allegation that the automobile, and deceased therein, were in peril while turning toward and driving toward and driving on the crossing. The answer attempted to deny knowledge of the peril, but was ineffective for that purpose as it failed to comply with the Missouri Statute, Section 776, R. S. Mo. 1929. Said statute required the answer to generally or specifically deny each material allegation of the petition controverted by

the defendant, or any knowledge or information thereof sufficient to form a belief. The answer alleged that both occupants of the automobile failed to look for, and, hence, were unconscious of the approach of the train.

Paragraph III of the answer to Count I contains the following:

> "Defendant * * * denies that defendant knew, and denies that by the exercise of ordinary care it could have known, and denies that it had notice or knowledge, that the automobile in which Ella Andlauer was riding was approaching or in a position of peril in time by the exercise of ordinary care, by use of the means at the command of the defendant to have avoided collision or injury to Ella Andlauer, and denies that defendant knew, or by the exercise of ordinary care could have known that the said Ella Andlauer was in a position of peril or coming into a position of peril in time to have given a warning of the approach of defendant's train or to slacken the speed thereof, or to stop the train in time to have avoided collision or injury." (R. 17.)

Said allegations on page 16 are duplicated as to Count II in paragraph III of said answer.

Paragraph IV of the answer to Count I alleges (R. 18):

> "* * * said Ella Andlauer, by the exercise of ordinary care, could have seen the approach of defendant's train *for more than one mile* before said train reached said crossing. The said Ella Andlauer, while riding in said automobile * * * *failed to look for said train* before going upon the track in front of the approaching train in time so that she could have notified her husband, who was driving said automobile, of the approach of said train before he

had driven said automobile upon the track in front of said train and in time to have avoided collision, and by the exercise of ordinary care the said Ella Andlauer could have avoided such collision."

Paragraph IV (R. 21) contains similar allegations as applied to Marcus Andlauer and then proceeds:

"* * * that the said Marcus Andlauer * * * failed to look for said train before going upon the track in front of the approaching train, in time so that he could have stopped said automobile and avoided said collision, and by the exercise of ordinary care the said Marcus Andlauer could have avoided such collision."

The reply consisted of a general denial to each count of the answer (R. 22).

The action was based upon Section 60-3203, R. S. Kansas 1923, which statute is set forth in the petition (R. 15), which statute authorized the personal representative to maintain an action for death when "caused by the wrongful act or omission of another."

The cause was called for trial in February, 1932. Petitioner offered evidence tending to prove the foregoing facts. At the conclusion of the evidence, respondent prayed the court to dismiss the plaintiff's case, with prejudice. This motion was sustained and a judgment dismissing the cause with prejudice was entered of record, all without petitioner's consent. The fact issues raised by the pleading were determined by the trial judge and were not submitted to the jury, either by peremptory instruction or otherwise. From this judgment petitioner appealed to the Circuit Court of Appeals for

the Eighth Circuit. That court filed its opinion on February 17th, 1933 (R. 62-69), and on February 20, 1933, rendered its judgment of affirmance (R. 69-70).

The petition for writ of certiorari was filed herein on May 8, 1933, and granted on October 9, 1933 (R. 75).

SPECIFICATION OF ERRORS.

1. The court erred in holding that the judge of the trial court, without the consent of petitioner, at the close of all the evidence, committed no error in rendering a judgment dismissing plaintiff's case, and in holding that the objection to the judgment as to such act was purely technical, and that petitioner's right to a trial by jury was not a matter of substance, but a matter of form.

2. The court erred in holding that petitioner had no right to recover on Count I of the petition.

3. The court erred in holding that petitioner had no right to recover on Count II of the petition.

4. The court erred in holding that Ellanore Andlauer was guilty of contributory negligence, as a matter of law.

5. The court erred in holding that Marcus Andlauer was guilty of contributory negligence, as a matter of law.

6. The court erred in holding that the petitioner could not recover on either count, under the rule of law known as the last chance rule.

7. The court erred in holding that the petitioner could not recover under the last chance doctrine (where the trainmen had no right to expect a clear track) unless there was evidence showing actual knowledge on the part of the trainmen of the position of peril of the deceased.

8. The court erred in holding that there was no evidence in the record from which the jury could infer that the trainmen had actual knowledge of the peril of the deceased.

9. The court erred in holding that the conduct of the trainmen exhibited such conscious indifference to the rights of the public as to deprive respondent of the defense of contributory negligence.

SUMMARY OF THE ARGUMENT.

I.

The statement of the last chance rule by the court below is in conflict with that of this and every other court on the question with reference to travelers in peril approaching and on highway crossings. That statement is (R. 67):

> "* * * the doctrine of discovered peril or last clear chance is not applicable because there is no proof that the employees operating the train had knowledge of the peril. This court has consistently held that such knowledge *must be actual.* It is bottomed on the theory that after the actual discovery of a person in peril, there is time in which by the exercise of ordinary care, to avoid the injury. In the instant case, there is no evidence that the employees actually discovered decedent's peril.
>
> * * * * * * * *
>
> The exception (last chance doctrine) is limited to cases in which the defendant actually discovers the person injured and his peril in time to avoid the injury. *It does not include cases where, by the exercise of ordinary care, the plaintiff might have made such discovery in time to avoid the injury.*"

This statement of the rule conflicts with the statement thereof in *Ellzey* v. *Kansas City Southern Ry. Co.,* 275 U. S. 236, and in *Porto Rico L. & P. Co.* v. *Miranda,* 62 Fed. (2d) 479 (C. C. A. 1), stating the doctrine under the authority of this court in the Ellzey case (which it cites) thus:

> "* * * the last clear chance doctrine applies, although the defendant may not have seen and known of the dangerous situation of the plaintiff, if circumstances existed from which he should have anticipated the presence of plaintiff at the place of the accident and in the exercise of reasonable care could have seasonably avoided an accident."

The statement of the rule below also conflicts with that in *Tutwiler* v. *Lowery,* 279 Fed. 479 (C. C. A. 6), where the court decides that this court had never held that actual knowledge of the peril was necessary. It also conflicts with *Robinson* v. *Ry. Co.,* 112 Fed. 484 (C. C. A. 6), the late Justices Lurton and Day sitting; *Texas & P. Ry.* v. *Nolan,* 62 Fed. (C. C. A. 5), where the court held that the first statement of the doctrine in *Davies* v. *Mann,* 10 Mees & W. 456, was in conflict with that below, to-wit: that the doctrine applied because:

> "The servant of defendant either saw animal *or could have seen him in time to have avoided the injury if he had moderated his pace to a careful one.*"

It is also in conflict with *Railway* v. *Klutt,* 148 Fed. 818 (C. C. A. 6), certiorari denied, 204 U. S. 672.

It is also in conflict with the statement in a highway crossing case by the late Chief Justice Taft in *Baltimore & Ohio Ry.* v. *Anderson,* 85 Fed. 413 (C. C. A. 6), Justice Lurton concurring.

It also conflicts with the now leading decision on the question in the British Empire. See *British Columbia Electric Ry. Co.* v. *Loach,* (1916) A. C. 719; 10 British Ruling Cases 882, and with the opinions of the late Chief Justice Anglin of Canada, in *Columbia Bithulithic Company* v. *British Columbia Electric Co.,* 55 Canada Su-

preme Court 1, and *Brenner* v. *Toronto Ry. Co.*, 13 Ont. L. Rep. 423.

The statement by the court below that:

> "In the instant case, the Railroad Company produced no testimony and there was no evidence that the engineer or fireman, or any other employees in charge of the train discovered the Andlauers or their peril before they were injured, and hence the exception to the rule of contributory negligence cannot be invoked"

is, in effect, a decision formulating a new rule upon an important question of law, to-wit: That unless the perpetrator of a wrong admits it, it cannot be proven by facts and circumstances. This is contrary to the general rule on the question, and to the rule in the state where the cause was tried made applicable by the Conformity Act. (*Lynch* v. *Railroad*, 208 Mo., l. c. 21, also l. c. 24.) There it is said:

"Knowledge, like actual notice, may be proved by direct evidence, or it may be inferred from facts and circumstances." There the court held that the fact that the track was unobstructed for two-thirds of a mile, on a clear day, authorized the jury to infer actual knowledge of the peril on the part of the trainmen. The jury herein could infer that the trainmen actually saw the automobile and the peril from the fact that there was no obstruction, the day was clear, and no change in the speed of the automobile. (*Chapman* v. *Ry.*, 217 Mo. App. 312, Syll. 5.) The jury could infer that one blast of the whistle would have stopped the automobile and saved deceased.

> "It is not always necessary to show the train could have been *stopped* by those in charge by the exercise of ordinary care in order to invoke the humanitarian (or last chance) doctrine; a failure to stop, slow down or *warn* by bell or whistle may be sufficient to invoke the doctrine. (*Chapman* v. *Ry.*, 217 M. A., l. c. 324.)"

The ruling of the court on this question is in conflict with the law everywhere.

The ruling of the court below as to whether the trainmen had actual knowledge under the evidence conflicts with the opinion of this court in *Grand Trunk Railway Company* v. *Ives*, 144 U. S. 408, holding that

> "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only when the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

II.

The Seventh Amendment commanding that "In suits at common law where the matter in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved" was ignored by the Court of Appeals in affirming the act of the trial judge in dismissing plaintiff's case at the close of the evidence, contrary to the decisions of this court in *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, and cited cases, and contrary to the decision of the Circuit Court of Appeals for the First Circuit in the case of *Langwa* v. *Gorton Pew Vessels Co.*, 59 Fed. (2d) 315.

The court erred in holding that notwithstanding the Seventh Amendment commands that

> "In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved."

And Sections 648 and 649, R. S. U. S., command that

> "The trial of issues of fact in the Circuit Courts *shall be by jury*, except in cases of equity and admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy *and by the next section.*
>
> Sec. 649. Issues of fact in civil cases in any Circuit Court may be tried and determined by the court without the intervention of a jury, *whenever the parties, or their attorneys of record file with the clerk a stipulation in writing waiving a jury,*"

that the judgment of dismissal was proper.

This contrary to the opinion of the Supreme Court in *Pederson* v. *Ry.*, 229 U. S., l. c. 153, holding that a trial court could not do so because "it was without authority so to do" and contrary to the opinion in *Slocum* v. *U. S.*, 228 U. S. 364, where the court cites and adopts the rule declared by Tidd as follows:

> "* * * where the case turns upon a question of fact, it ought to be submitted to the jury *unless the plaintiff's counsel expressly consent* to his being non-suited, a mere tacit acquiescence not being, it seems, sufficient."
>
> 2 Tidds Pr. 917.

III.

The Court of Appeals determined that plaintiff was not entitled to recover on either count, notwithstanding the failure to slow down while passing the college grounds to 25 or 30 miles per hour, in accordance with the custom, and notwithstanding the fact that decedents proceeded over the crossing on the assumption that the custom would be observed. Had it been observed the automobile would have been 80 feet north of the track when the train reached the crossing. The failure of the court below to give effect to the custom to relieve deceased from the imputation of contributory negligence as a matter of law conflicts with the law as declared in *Farrell* v. *Ry.*, 138 Fed. 28 (C. C. A. 2), and with the general law on the question as stated in Sec. 1669, Thompson on Negligence, and same section in both of White's Supplements to said work.

IV.

The Court of Appeals determined that deceased were guilty of contributory negligence as a matter of law, notwithstanding respondent's trainmen failed to comply with the custom and the statute requiring a whistle to be blown and notwithstanding the almost direct approach of the train prevented the deceased from knowing of the extraordinary and reckless speed and notwithstanding a warning whistle would have advised deceased of the fast approach and caused the automobile to stop before the collision. Before the court could hold Marcus Andlauer guilty of contributory negligence as a matter of law it would have to find that he knew of the unusual speed at which the train approached. Before it could hold Ellanore

Andlauer likewise guilty it must find she had like knowledge and also that her experienced husband was not exercising due watchfulness and care. The decision conflicts with the general law on the subject.

In Thompson on Negligence, Vol. VIII (White's Supplement), Sec. 1669, it is said:

> "Where the traveler sees a train at such a distance from a crossing that in the exercise of ordinary care he believes he can cross in safety he is not negligent as a matter of law in making the attempt, though it transpires that he miscalculated the distance and the speed of the train."

V.

The decision holding Ellanore Andlauer guilty of contributory negligence as a matter of law conflicts with the decisions of the Circuit Court of Appeals for the Ninth Circuit, in the following cases:

Southern Pacific Ry. Co., 248 Fed. 261;
Trenholm v. *Ry. Co.*, 8 Fed. (2d) 452;
Southern Pac. Ry. Co. v. *Stephens*, 24 Fed. (2d) 182.

The decision on said point also conflicts with the decision of the Court of Appeals for the Seventh Circuit in *Ry.* v. *Divine*, 39 Fed. (2d) 537.

The Court of Appeals for the Ninth Circuit in *Trenholm* v. *Ry.*, 8 Fed. (2d) 452, expressly holds that the decision by the 8th Circuit in *Bradley* v. *Ry.*, 288 Fed. 484, followed and applied herein conflicts with the rule on the same question applied in the Ninth Circuit and with "the weight of authority."

VI.

The decision of the court below that the trainmen could assume that the automobile would stop before going on the track was conditioned upon the giving of a warning of the unusually fast approach of the train and the opinion below on said point conflicts with those of this court in *Continental Ry. Co.* v. *Stead,* 95 U. S. 161, and *Texas & Pacific Ry. Co.* v. *Cody,* 166 U. S. 660, holding that the train "is bound to give due warning of its approach so that the wagon may stop and allow it to pass." The assumption that the train was coming at the usual rate of speed lulled the deceased into feeling that they could safely cross and made the warning imperative.

VII.

The Court of Appeals failed to hold that the respondent's trainmen in driving over the much-used public crossing at the excessive rate of 55 or 60 or 90 miles per hour at an unusual time, contrary to the custom to slow down to 25 or 30 miles per hour while passing the college grounds and into the city of St. Marys, in violation of its ordinance limiting the speed to 20 miles per hour, and committing a crime by violating the statute requiring the warning for the crossing and without any warning, exhibited such gross disregard for the rights of others and the public generally as to warrant an inference of wanton negligence or conscious indifference to consequences so as to deprive the respondent of the defense of alleged contributory negligence, and this contrary to the general law on the question as stated in Secs. 20, 22, Thompson on Negligence, and wealth of cases in *Breme* v. *Ry. Co.,* 318 Ill. 1, l. c. 17.

VIII.

The statement that:

> "Defendant denies * * * that defendant knew, or, by the exercise of ordinary care, could have known, that said Ella Andlauer was in a position of peril, or coming into a position of peril, in time to have given a warning of the approach of defendant's train, or to slacken the speed thereof, or to stop the train in time to have avoided collision and injury"

was not the denial required by Section 776, R. S. Mo. 1929.

Said section, with reference to a denial of knowledge, requires the defendant to deny:

> "* * * any knowledge, or information thereof, sufficient to form a belief."

The Missouri court, construing said section holds that an answer of the kind in question is insufficient and that a denial of knowledge, or information sufficient to form a belief, must be included in the pleading.

In *Revely* v. *Skinner*, 33 Mo. 98, l. c. 100, it is said:

> "Our statute requires that the answer of the defendant shall contain a special denial of each material allegation of the petition, controverted by the defendant, or of any *knowledge* or *information* thereof sufficient to form a belief, and every material allegation not so controverted is, for the purposes of the action, to be taken as true. * * * This section of our practice act is in the precise language of the New York code, and it has been repeatedly held by the Supreme Court of that state that the defendant must aver that he has neither

knowledge nor information, and the averment of one without the other is insufficient to controvert a material allegation."

See also *State ex rel.* v. *Gilbert*, 163 M. A., l. c. 683; *Watson* v. *Hawkins*, 60 Mo. 550.

Since the admission contained in the respondent's answer, by failing to deny that the deceased were in peril, while turning toward, moving toward, and moving on the track, and since the trial court found that the petitioner's evidence was true (R. 63), and since the respondent, by moving to dismiss and succeeded in having the petitioner's cause dismissed, admitted its liability to the petitioner, the only question to be determined is the amount of petitioner's damage.

This court, in *Gasoline Products Co., Petitioner*, v. *Champlin Refining Co.*, 283 U. S. 494, 501, holds that where the liability of a defendant is established and the damage can be ascertained without a trial of the issue of liability the case will be reversed with directions to try the issue as to damages only. Therefore, this case should be reversed with directions to the Circuit Court of Appeals to remand the case to the trial court with directions to empanel a jury to ascertain the amount of petitioner's damages only, as that is the only issue left to be tried in the case in view of the respondent's admissions.

Respondent's counsel have had no opportunity to reply to the following pages of this brief, for the reason that they have received the unpaged proof of same on Tuesday, November 7th. They did receive an unpaged proof of the preceding part of this brief on Saturday, Novem-

ber 4, 1933. Counsel for petitioner have had no opportunity to reply to respondent's brief, for the reason that they received an unpaged proof thereof on Tuesday, November 7, 1933.

ARGUMENT.

I.

The court erred in holding that petitioner had no right to recover on Count I of the petition for the wrongful death of Mrs. Andlauer. Said holding is in conflict with the rulings of this court denying certiorari in *Southern Pac. Co. v. Trenholm*, 270 U. S. 649, and *Chicago & Eastern Illinois Ry. Co. v. Divine*, 281 U. S. 765, and with the weight of authority on the question.

The opinion of the court below follows *Bradley* v. *Mo. Pac. Ry. Co.*, 288 Fed. 484 (R. 70).

The opinion in the Bradley case (288 Fed. 484) (the authority for the extraordinary opinion herein) was expressly disapproved by the appellate court for the Ninth Circuit in *Trenholm* v. *Southern Pac. Co.*, 8 F. (2d) 452. In discussing the proposition that a "passenger is as much under the duty of looking for locomotives as the driver," the court said, l. c. 454:

> "The principal case supporting this latter proposition is *Bradley* v. *Missouri Pacific R. Co.*, C. C. A. 288, F. 484, upon which the court below chiefly relied in directing the verdict in favor of the defendant in error. If we were to accept that extreme view of the law, there would seem to be no escape from the conclusion reached; but that view is not in harmony with the decision of this Court in *Southern Pac. Co.* v. *Wright*, 248 F. 261, and is not in our opinion supported by the weight of authority.
>
> * * * * * * * * *
>
> A person of ordinary prudence, riding with another upon his invitation, will naturally put a certain trust in his judgment, and will rely in some measure on the assumption that he will use care to avoid the

ordinary dangers of the road. In order to conclusively charge a mere passenger with contributory negligence in failing to see an approaching train, something more than ability to see and a failure to look must be shown. His failure to look is evidence to be considered on the question of his negligence, but it is not conclusive against him. In general the primary duty of caring for the safety of the vehicle and its passengers rests upon the driver, and a mere gratituous passenger should not be found guilty of contributory negligence as a matter of law, *unless he in some way actively participates in the negligence of the driver,* or *is aware,* either that the driver is incompetent or careless, or unmindful of some danger known to or apparent to the passenger, or *that the driver is not taking proper precautions in approaching a place of danger, and being so aware fails to warn or admonish the driver, or to take proper steps to preserve his own safety.*"

In other words, under that authority it must appear that the passenger had *actual knowledge* that the driver was incompetent or careless or unmindful or *must have actual knowledge* that the driver is not taking proper precautions before the court can declare as a matter of law that the passenger was guilty of contributory negligence. Quoting from the New York Court, the opinion (*Trenholm* v. *Ry., supra*) proceeds:

"He had a right to assume that Mr. Welsh, his friend, would exercise reasonable care in the operation of his car; and unless he was aware of the railroad crossing, and had reason to apprehend that Mr. Welsh would run his car into a position of danger, the jury might properly find that he was in the exercise of that reasonable degree of care which an ordinarily prudent man would exercise under like circumstances, by merely sitting in his seat and

talking with a fellow passenger. That is probably what 75 per cent of the persons who go out for a drive with their friends do under the circumstances. They have no power over the car, no authority over the driver; and while they would not be free to ride with a reckless driver, knowing the fact, and charge their misfortunes upon others we do not think it can be said that there is a failure to produce evidence of a lack of contributory negligence when it appears, as it does here, that the plaintiff's intestate was sitting in his seat, engaged in a conversation with a fellow passenger who was occupying the seat behind him, and who was leaning forward for the purpose of carrying on the conversation, leaving the driver free to manage the car. Of course, if the passenger was familiar with a known danger, if he was better informed of the circumstances than the driver, it might be his duty to watch and point out the danger, but here the car was being driven upon a flat land, in broad daylight, and at an angle with the railroad track, which had been crossed some distance back and was to be crossed again at grade. It was an open country, and assuming that plaintiff's intestate was familiar with the country, which is the most favorable view for the defendant, it cannot be said as a matter of law that he was bound to anticipate that Mr. Welsh would drive upon the crossing without observing the situation and taking the necessary precautions."

* * * * * * * * *

"—we think the rule (above stated) best accords with the everyday conduct of the ordinarily prudent person under the circumstances, and that is the standard of due care."

This Court in *Southern Pac. Co.* v. *D. P. Trenholm, as Administrator, etc.*, 270 U. S. 649, denied the petition for certiorari notwithstanding it appeared from the

face of opinion (8 F. [2d], l. c. 454) that there was a direct conflict between the law, as declared in the Trenholm and Wright cases in the Ninth Circuit and that declared in the Bradley case in the Eighth Circuit. Had the opinions in the Trenholm and Wright cases improperly declared the law this Court, because of the conflict, would necessarily have granted the petition and reversed the Trenholm case and properly declared the law on the question for the country. These considerations demonstrate that the opinion of the Circuit Court of Appeals is in direct conflict with the ruling of this Court denying the writ in the Trenholm case.

In *Chicago & E. I. Ry. Co.* v. *Divine,* 39 F. (2d) 537, a husband and wife, with their children, while crossing defendant's tracks were killed by collision with a speeding train. "The accident occurred about noon on a clear summer day." (l. c. 538.) Two witnesses, as here, testified that the statutory whistles were not sounded. Following the rulings in *Northern Pacific Railroad Co.* v. *Freeman,* 174 U. S. 379, and *Chesapeake & Ohio Ry. Co.* v. *Steele* (opinion by Lurton, J., 84 F. 93), the court affirmed the judgment for plaintiffs. It was urged under the authority of opinions by the court for the Eighth Circuit that the wife should be held guilty of contributory negligence, as a matter of law. But the court said:

> "For anything that appears to the contrary, she might have realized the approach of the train and have been too much terror stricken to do anything; or she may have shouted a warning to her husband, and he, miscalculating the distance of the train, nevertheless, recklessly, if you please, undertook to cross. What could or should she have done to prevent it? * * * Even had she discovered the

> danger in sufficient time for averting the accident had she been in charge of the car, there is still nothing to indicate that, with another driving the car, she did not do all that a reasonable person under such circumstances would be expected to do to avoid the calamity. Without any evidence upon this subject, are we at liberty, as a matter of law, to reject every theory or surmise of what she did or failed to do, and adopt only such as would conclusively assume her negligence contributing to the accident? We think not."

And so here. The train passed Mr. Nagle about 500 feet east of the crossing and the engine was somewhat ahead of the witness when he saw it *at that distance.* He testified that he was "about 200 feet east of the crossing when the collision occurred" (R. 54) and (evidently confused) he further said he was 500 feet east of the entrance at that time. When the witness saw the train the automobile had just left the highway pulling into the college. Hence, no witness could, or did, testify as to any act of omission or commission by Mrs. Andlauer showing that she was negligent. She was sitting in the car, with her husband, and that is all. Does not the language in the opinion in the Divine case apply to her? Does it not properly declare the law on the question? We respectfully submit that it does for the conflicting opinions from the Eighth Circuit cited in the opinions and dissenting opinion in that case were before this Court when it denied the petition for certiorari in *Chicago & Eastern Illinois Ry. Co.* v. *Divine, Administrator,* 281 U. S. 765. And so the opinion of the court below is in direct conflict with the ruling of this court denying the writ in that case.

That in a case of this character, the liability of the railroad company for the death of the guest or passenger in an automobile is always one for the jury is shown by the opinion on this question in *Baker* v. *Ry. Co.*, 248 N. Y. 131. There the railroad company failed to sound bell or whistle while approaching the crossing at which a guest in an automobile was killed by a collision between the automobile and the train. The court unanimously said through Cardoza, Ch. J.:

> "Contributory negligence is urged, but again the jury must decide. If Vardon, the driver, were the plaintiff a different question would be here. The actual question is one as to the contributory negligence, not of driver, but of passenger. The case being a death one, the burden of proof on this issue was on the defendant (*Nicholson* v. *Greeley Square Hotel Co.*, 227 N. Y. 345; *Chamberlain* v. *Lehigh Valley R. R. Co.*, 238 N. Y. 233.) Baker may have given warning, and his warning may have been unheeded. There is testimony by Vardon that he was silent, but Vardon was a hostile witness. Nor is this the only explanation why Baker would be cleared of fault. Believing the car was about to stop, he may have thought the warning would be heedless, and discovering too late that the car was going on, he may have thought interference would be dangerous. These and like possibilities were to be estimated by the triers of the facts. They make it impossible to deal with the issue as a question for the court."

In *Crouch* v. *New York Central R. R. Co.*, 260 N. Y. 227, four young people were killed at a railroad crossing. On Sunday afternoon, July 1, 1928, shortly after 5 o'clock, in broad daylight, the Ford roadster was struck

at a crossing which was not a public highway crossing, but was a freely-used crossing. Said Pound, Ch. J.:

> "The duty of care at such a crossing might be found to be the same as at a public highway crossing. * * * The highway crossed the tracks at right angles. * * * The jury might have inferred that it gave no signals to indicate its approach. * * * Francis and his passengers were guests at a summer-cottage or camp on the lake. They knew of the existence of the railroad crossing. * * * The only eye-witness of the accident was Paul Woods, the locomotive fireman. On the first trial he said nothing about the conduct of the occupants of the automobile. On this trial he testified that none of them looked toward the engine at any time. The jury was not bound to accept his evidence on the point."

Holding that the railroad was liable for killing the passengers, the court said:

> "In the case of the passengers, the evidence does not demonstrate that they were not in the exercise of ordinary care for their own safety; that they did not call the attention of the driver to the approaching train or otherwise clear themselves from fault. There is no evidence which speaks one way or the other with reference to their contributory negligence. They may have given warning and their warning may have been unheeded. They may have seen the danger and thought an interference would be dangerous. (*Baker* v. *Lehigh Valley R. R. Co.*, 248 N. Y. 131, 136; *Nelson* v. *Nygrew*, 259 N. Y. 71.) The judgments in their cases must stand. In death cases the burden of proof is on the defendant (Cir. Prac. Act §265) and the jury must decide when the evidence presents an issue of fact."

In *Nelson* v. *Nygen*, 259 N. Y. 71, it was held that a guest asleep in an automobile could recover, and that it was not contributory negligence to sleep, citing cases from many states, including *Weidlich* v. *N. Y. N. H. & H. R. R. Co.*, 93 Conn. 438, at 442, thus, in part:

> "If he had been asleep, or reading a book, or engrossed in talk with another than the driver, or in deep thought, he would not have been negligent because of this. * * * No duty was upon the intestate to explain, excuse or justify his course."

In the Connecticut opinion, l. c. 441, 442, we find the following statement as to the duty of an automobile guest or passenger:

> "He is not expected to direct the driver, nor keep a lookout."

Countless authorities to the same effect might be cited. The judges who were responsible for the foregoing opinions differ with the court below as to the inferences to be drawn from the facts in this case. Yet the court below says that reasonable men could not differ as to the conclusion to be drawn.

II.

The court erred in holding that petitioner had no right to recover on both counts of the petition. Said holding is in conflict (a) with the authorities holding that driver had a right to proceed on the assumption that the custom to slow down would be observed; (b) with the authorities holding that under the facts and circumstances it was the function of the jury to say whether he was at fault; (c) with the authorities holding that under the antecedent negligence, humanitarian or last chance theories of the law the case should have been submitted to the jury; (d) with the authorities holding that the trainmen were guilty of conduct equivalent to wantonness.

The Court of Appeals overlooked the legal effect of the following facts stated in the opinion:

> "There was evidence that the train was traveling * * * 60 miles an hour, and there was testimony of two witnesses to the effect that they did not hear the crossing whistle sounded. There was also evidence that the train was about an hour late *and that it usually slowed down to from 25 to 30 miles an hour in passing by the St. Mary's College property.*
>
> * * * * * * * * *
>
> "In effect, the negligence charged is * * * (2) failure to observe a custom theretofore observed by it to slow down its cars when passing St. Mary's College and entering the city limits of St. Marys."
>
> * * * * * * * * *
>
> "An ordinance of the city of St. Marys limits the speed of trains within the city limits to 20 miles an hour.
>
> * * * * * * * * *
>
> "As they turned north approaching the crossing they were traveling at a speed estimated at from 12 to 15 miles an hour and did not slacken nor increase that speed so far as the record shows."

(There was also evidence in the record that the speed was as low as 10 miles an hour, but this is not stated in the opinion.)

"The distance from the north edge of the highway to the south rail of the tracks 71½ feet."

The court's opinion, in holding that the deceased were both guilty of negligence as a matter of law, failed to give effect to the rule that the jury were entitled to infer every fact in favor of the plaintiff's case that reasonable men might reasonably find was established by said evidence.

The jury were entitled to infer that the automobile was the normal length of an automobile, to-wit: From 9 to 12 feet in length; that the automobile, from the time it started to turn north traveled the 71½ feet to the south rail, plus the length of the automobile or at least 80 feet; that the automobile was going as low as 10 miles per hour while traveling said 80 feet; that the train was going 60 miles an hour; that the deceased looked before they turned and saw the oncoming train to the east; that the driver assumed that the train was going at its customary rate for the opinion finds that he was familiar with the crossing and custom.

If, therefore, the automobile traveled 80 feet while going at 10 miles an hour, the train was at least 480 feet away at the time the decedents looked; then had the train been going one-half 60 miles per hour or from 25 to 30 miles per hour, in accordance with the custom, the automobile would have traveled just twice as far as it did travel after turning north to the point of collision. Under these physical facts, the automobile would have been in a place of safety 80 feet north of the track. A similar legal result follows if we say that the jury had a right

to infer that the automobile was going 12 miles an hour. If it were, then at the moment the automobile turned north the train was 400 feet to the east and so the automobile would have crossed in front of the train while 200 feet away.

The foregoing facts and considerations establish that notwithstanding the facts found by the court in its opinion demonstrate that deceased would have escaped had the defendant not negligently violated the custom which it had theretofore observed—a custom which the physical facts and circumstances show that it was necessary for it to observe—the collision could not have happened. Yet the court has entirely failed to give the usual legal effect to the facts found by it in its opinion and declared as a matter of law that not only was Mr. Andlauer guilty of contributory negligence, *but that his wife was also guilty of such contributory negligence.* We respectfully submit that this is a mere arbitrary finding on the part of the court which the physical facts found by the court in its opinion demonstrate to a mathematical certainty is contrary not only to the general law on the question, but contrary to the law as declared by this court in countless cases.

Furthermore, in addition to the facts stated in the opinion, the physical facts justified the inference that the train was going much faster than 60 miles an hour because, notwithstanding the fact that it could have been stopped, as the opinion finds, in several hundred feet, and as an expert witness said, in 1,000 feet, going at 60 miles an hour, yet it was not stopped until it traveled over 1,750 feet so that the jury were authorized to infer that the speed was as much as 80 or 90 miles an hour. Upon the hypothesis that it was going as much

as 80 miles an hour, then when the deceased looked to the east before they turned or at the time of turning, they saw a train 800 feet away which they had a right to assume was going at from 25 to 30 miles an hour and that they had ample time in which to cross. The opinion shows that the defendant was charged with negligence in violating the custom to slow down and the evidence stated in the opinion establishes the custom and the violation thereof.

We respectfully submit that the court entirely overlooked this pleaded and proven issue and wholly failed to determine the question as to whether or not respondent was guilty of negligence in violating the alleged custom and in determining whether or not respondent's negligence in said respect was the cause of the injury and wholly failed to determine whether or not the fact that there was such a custom deprived the court of power to declare as a matetr of law that Mr. Andlauer, or his wife, were guilty of contributory negligence.

(a) The traveler is not bound to anticipate negligence on the part of the railroad company, and hence has right to assume that railroad will operate its road or trains with the vigilance required by law and consequently comply with the law which requires it to blow the whistle. In this case, the Kansas statute required the defendant not only to sound the whistle at least eighty rods from the crossing, but to give the blasts in a peculiar way and made its failure to do so a crime. *A. T. & S. F. Ry. v. Sanders*, 22 Kan. 1.

Mr. Andlauer was familiar with the schedules of the trains and knew that ordinarily no train was due from the east at the time. The record is silent as to whether or not he knew a train was due from the west and hence Mr. Andlauer may have looked for a train from the west. Since the railroad company failed to blow the whistle from the east, it necessarily followed that the

court could not declare as a matter of law that reasonable men might not reasonably differ as to whether or not Andlauer was doing all that the law required him.

Grand Trunk R. R. v. *Ives*, 144 U. S. 408.

Andlauer had right to proceed on assumption that custom would be observed. *Farrell* v. *Ry.*, 138 Fed. 28 (C. C. A. 2).

> "Where the traveler sees a train at such a distance from a crossing that in the exercise of ordinary care he believes he can cross in safety he is not negligent as a matter of law in making the attempt, though it transpires that he miscalculated the distance and speed of the train."
>
> Thompson on Negligence, Sec. 1669 (White's Supplement).

In the same section of the original work, Vol. 2, p. 358, it is said:

> "Mere errors of judgment, where ordinary care has been exercised, are not generally set down as amounting to negligence."

In *Strauchon* v. *Ry.*, 232 Mo., l. c. 599, it is said:

> "* * * when one views an approaching train from a point directly in front of it, or from an acute angle * * * it is much more difficult to judge of its speed than if it is viewed from the side thereof, or from an obtuse angle. This fact is recognized by the law."

(b) The jury could have inferred in the absence of a warning whistle to Andlauer and because he knew that under the schedules no train was due from the east, that common prudence required him to look to the west for a train after he turned north, and hence he could not be convicted of contributory negligence as a matter of law. If he did not look to the east when 71½ feet or less from the crossing this was not, as a matter of law, contributory negligence under the circumstances.

In *Chamberlain* v. *Lehigh Valley R. Co.*, 238 N. Y. 233, the driver could have seen the train 600 feet from the crossing. Said the court:

> "The appellate division has held in substance that because the deceased did not look to the right when he was 105 feet or less from the crossing, in the direction from which the train came, and did not use the period of 9.2 seconds, or less, to stop his car and avoid the accident, he was guilty of contributory negligence as a matter of law.
>
> This we think was error. With one pair of eyes one cannot look in both directions at the same time. The duty of deceased was to look in both directions, keep control of his car, and negotiate it across the tracks.
>
> * * * * * * * * * *
>
> —was he bound to assume that without warning a train would go over the Westbrook crossing, come up behind him into the 1000 or 1200 feet between the two highway crossings and emerge from behind the barn while he was looking toward the Westbrook crossing? * * * We think the question was for the jury."

The automobile in that case was traveling on a track paralleling the railroad, as was the automobile in the case at bar. It may be that Andlauer looked to the east some appreciable time before he turned north. If so the train had not yet come within his range of vision. If he knew it could not reach the crossing before he had crossed

if it observed the custom to slow down he could not be held negligent. We submit that under the Chamberlain case he cannot be convicted as a matter of law of contributory negligence. Had Andlauer looked to the east before he turned north, then it was for the jury to say whether or not he should have looked again before proceeding on to the tracks.

In *Carr* v. *Pennsylvania R. R. Co.*, 225 N. Y. 44, a crossing accident injured plaintiff (a driver) at noon on June 3, 1914. He was driving with his wife in a buggy. Reversing the judgment for defendant, and commenting on the law, it is said:

> "But it is not the law that as a distinct and conclusive circumstance, one must assume that no warning of the approach of trains will be given and relax in no degree his vigilance although silence suggests security, and it is not the law that one who has looked from a proper viewpoint must, at his peril, look again before proceeding.
>
> The evidence does not demonstrate the absence of care on the part of the plaintiff. It suggests that by greater care he might have avoided the accident. * * * We cannot accept his version and say as a matter of law that his negligence was palpable."

In *Horton* v. *Ry. Co.*, 237 N. Y. 38, l. c. 49, it is said:

> "Also as bearing upon the question of Horton's care and caution we may take into consideration the absence of any warning or notice of the approach of the train. * * *"

Citing *Wall* v. *Int. Ry. Co.*, 233 N. Y. 309.
Carr v. *Ry.*, 225 N. Y. 44, and
Barthelmas v. *Ry.*, 225 Penn. St. 597.

In *Schrader* v. *N. Y. C. and St. L. Ry. Co.*, 254 N. Y. 148, in a *per curiam* opinion, it is said:

> "If no warning is given of the approach of the train, silence may at times suggest some relaxation of vigilance, but not an entire absence thereof, as where a traveler has looked where he could see from a proper viewpoint, and is not required to look again immediately before proceeding onto the tracks (*Carr* v. *Pennsylvania R. R. Co.*, 225 N. Y. 44, 47).
>
> Each case is governed by its own conditions and circumstances. No two crossing cases are identical.
>
> * * * * * * * * *
>
> This Court has never adopted or been influenced by the 'stop, look and listen' rule which was carried to such an extreme in *B. & O. R. R. Co.* v. *Goodman* (275 U. S. 66, 70) as to suggest a duty to stop and get out of one's vehicle to look up and down the tracks at a dangerous crossing before proceeding. Our rule of conduct is not standardized."

In *I. C. Co.* v. *Sollinger's Adm.*, 160 Ky. 455, l. c. 457, it is said of a decedent that because the law required whistles to be blown he had a right to rely upon the performance of its duty by defendant. Thus:

> "His mere failure to look, therefore, did not constitute contributory negligence as a matter of law; for he had the right to assume that the company would perform its duty by keeping a proper lookout, moderating the speed of the train and giving timely warning of its approach. Were we to adopt the rule contended for by appellant, then in every case the railroad company would be exempt from liability for accidents occurring on crossings. Manifestly in every case the decedent, if he looked, could see the train which killed him. Such is not the rule. In every case the question of proper care on the part of the traveler depends on a number of circum-

> stances, such as the number of trains passing, the condition of the weather, the speed of the train, the giving of proper signals, etc., and it is, therefore, uniformly held in cases of this kind that it is peculiarly within the province of the jury to consider all the surrounding circumstances, and say whether or not the traveler was guilty of contributory negligence."

In *C. & O. Ry.*, 200 Ky., l. c. 505, treating of the failure to give signals:

> "—where they are required it is the established rule that ordinarily a traveler may anticipate such signal from an approaching train, and it is a question for the jury as to whether it is negligence in him to rely on his hearing without stopping and looking."

(c-d) The Court of Appeals erred in failing to hold that the jury, under the evidence, were authorized to infer that the trainmen were at fault in that notwithstanding they saw, or by ordinary care could have seen, the automobile with the deceased therein, traveling on the highway toward the crossing without changing speed and that they were in a position of peril while turning toward, moving toward, and on the track, in time, by the exercise of ordinary care, to have saved them by blowing the whistle or slackening the speed of the train,

The court erred in that notwithstanding the opinion finds that the petition charged that respondent's employes, notwithstanding they knew, or by the exercise of ordinary care, could have known of the peril of the plaintiff's intestates approaching the track, they negligently failed to blow the whistle or slacken the speed of the train and thus killed the deceased. In denying recovery on this ground, the court held, notwithstanding the employes had no right to expect a clear track at the crossing, not-

withstanding the evidence shows that it was a much traveled crossing, especially on Sunday afternoon and had been for years before, yet that unless the employes committed willful murder, there can be no recovery against respondent for the killing, no matter how reckless and negligent the respondent was. In other words, the court held that in the Eighth Circuit there is no obligation whatsoever upon the part of the employes of a railroad train, either to observe a custom, when passing through a populous community, or over a much traveled crossing, or to obey an ordinance, and that they can with impunity ignore them and that if there be a shade of evidence justifying the inference that the person approaching, or going over the crossing, is negligent, that the railroad company is justified in killing the traveler on the highway. In thus deciding, the court has applied a principle which properly applies only to cases where there are trespassers upon the railroad track or where the trainmen have no reason to anticipate the presence of such persons. But the opinion declares that unless the plaintiff conclusively proves beyond a reasonable doubt that the trainmen had actual knowledge of the peril, then no duty arises upon the part of the trainmen with reference to the traveler, and that though the trainmen wholly disregard their duty to keep a reasonable lookout that the fact that they have no right to expect a clear track and that they are charged, as a matter of law, with the presence of travelers on the highway approaching and on the crossing, yet if they can show that they were guilty of negligence and recklessness in not keeping a reasonable lookout that the railroad company can take advantage of its own wrong as a defense to the application of the last chance doctrine. In other words, that the railroad com-

pany cannot be held liable for wrongful death unless its employees are guilty of willful murder.

It is true the court below has in many cases stated the rule that actual knowledge of the peril upon the part of the railroad employe is necessary and that the fact that he negligently keeps a lookout and violates his duty is a complete defense in such a situation. We respectfully submit that the court below is the only court in the Anglo-Saxon world that thus states and applies the last chance rule in a case as here where the trainmen were required to be on the lookout. As thus stated and applied herein, the opinion is in conflict with the opinion of this Court in *Kansas City Southern Railway Co.* v. *Ellzey,* 275 U. S. 236, cited in appellant's brief at page 51, where the Supreme Court thus defines the doctrine:

> "That doctrine, rightly applied * * * amounts to no more than this, that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril *or unaware of it only through carelessness,* had in fact a later opportunity than the plaintiff to avert an accident."

The opinion hereon conflicts with the opinion on this identical question by the late Chief Justice Taft, when on the Circuit Bench, in *Baltimore & Ohio Ry. Co.* v. *Anderson,* 85 Fed. 413, and also in conflict with the opinion of the late Justice Lurton, in *Railroad Co.* v. *Cook,* 66 Fed. 119, when sitting in the same Circuit.

Justice Taft, in *Baltimore & Ohio Ry. Co.* v. *Anderson, supra,* thus defined the last chance rule at a railroad crossing where the injured person had a right to be as a rule wherein the negligence of the traveler on the highway

"—would not relieve the defendant from liability if they found that, by due care, the engineer and fireman might have stopped the train after they had seen, *or ought to have seen,* the position of danger in which the plaintiff, by reason of his negligence, was placed, and could thus have avoided injuring him."

* * * * * * * * *

"—the plaintiff here was on the highway where he had the right to be unless there was danger of his being run over by a train of the defendant, and *where the defendant was bound to anticipate the possibility of his being when it was using the crossing.*"

The opinion herein is also in conflict with the opinion in another Circuit in *Philadelphia & Reading Ry. Co.* v. *Klutt,* 148 Fed. 818, in which case the Supreme Court denied certiorari, 204 U. S. 672, and thus declared the law:

"It is a settled principle of law that, although a plaintiff, who sues for an injury inflicted by the defendant, might, by the observance of proper care, have avoided exposing himself to the injury, yet this will not prevent him recovering damages from the defendant, if the latter discovered, *or by the exercise of ordinary care might have discovered,* the exposed situation of the plaintiff in time, by the exercise of ordinary care and diligence, to have averted the effect of the plaintiff's negligence and avoided the injury which happened."

The opinion herein is also in conflict with the opinion in *Tutwiler* v. *Lowery,* 279 Fed. 479, in the Sixth Circuit. It is contrary to the opinion of the Kansas Supreme Court, in *McMahan* v. *Ry. Co.,* 96 Kan. 271, and in *Railway Co.* v. *Arno,* 67 Kan. 260, in which latter case

Federal Judge Pollock, citing *Coaching Co.* v. *Tolson*, 139 U. S. 551; *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, held that if the operator of the vehicle which injured the traveler on a highway

> "* * * saw deceased in a position of danger, *or by the exercise of reasonable diligence should have seen* him in such position in time to stop the car before killing him and thus avoid the tragedy, the defendant is liable."

It is also in conflict with the opinion of the English Court, the highest court in the British Empire, in *British Col. Electric Railway Co.* v. *Loach*, (1916) A. C. 719, 10 British Ruling Cases, l. c. 892, in which case the court held that notwithstanding the jury found that the deceased was guilty of negligence contributing to his injury, and that it continued up to the moment of the injury, yet that the railway company was liable, notwithstanding it could not, after it actually knew, or could have known, of the peril of the deceased, have saved him by the exercise of ordinary care where the railway company was guilty of antecedent negligence which prevented it from saving the deceased after his peril became manifest.

It is also in conflict with the opinion of the late Chief Justice of Canada, in *Brenner* v. *Toronto R. Co.*, 13 Ont. L. Rep. 423, and with the opinion of Supreme Court of Canada in *Columbia Bithulithic, Ltd.*, v. *British Columbia Elec. Ry. Co.*, 55 Can., Can. S. C. 1.

In other words, there is no court, as above stated, in the Anglo-Saxon world, and no court in the United States except the court below, which holds that a railway company cannot be held liable for an injury at a highway crossing or a death occasioned at a highway crossing un-

less the plaintiff proves that the railroad employes had actual knowledge and were thus guilty of willful murder.

In *Porto Rico Ry. Light & P. Co.* v. *Mirandan,* 62 Fed. (2d) 479, the Court of Appeals for the first circuit so recently as December 29 held:

> "It has been a recognized rule in this circuit since 1914 that, in a situation like the one here found to exist, the last clear chance doctrine applies, although the defendant may not have seen and known of the dangerous situation of the plaintiff, if circumstances existed from which he should have anticipated the presence of plaintiff at the place of the accident and in the exercise of reasonable care could have reasonably avoided an accident.
>
> * * * * * * * * * * * * and this was so, even though defendant's motorman was not shown to have seen and known of plaintiff's dangerous situation before he ran upon her. * * *
>
> This court, in *Kansas City Southern Ry.* v. *Ellzey,* 275 U. S. 236, states the doctrine of last clear chance as follows:
>
> 'That doctrine rightly applied in the Chunn case amounts to no more than this: that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of plaintiff's peril, *or unaware of it only through carelessness,* had in fact a later opportunity than plaintiff to avert an accident.' " (Italics ours.)

So that *Kansas City Southern Ry.* v. *Ellzey* has been interpreted by the Court of Appeals of the First Circuit as defining the last chance rule directly contrary to the definition herein.

Section 60-3203, R. S. Kansas 1923, provides:

> "When the death of one is caused by the *wrongful act or omission* of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission." (R. 10.)

Laws of Kansas 1925, page 275, provide:

> "A steam whistle shall be attached to each locomotive engine, and shall be sounded four times (two long and two short blasts) at least eighty rods from the place where the railroad shall cross any public road or street, except in cities or villages * * * and the corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect."

The opinion finds that:

> "There was evidence that the train was traveling from fifty to sixty miles an hour, and there was testimony of two witnesses to the effect that they did not hear the crossing whistle sounded." (R. 66.)

The court assumed "that the evidence on the question of primary negligence was such as to entitle plaintiff to have had that issue submitted to the jury." (R. 68.)

Witness Nagle was riding in an open car, the day was clear and cold. His attention was attracted to the semaphore some distance east of the scene of the collision, while going west, and noticed that it was up, though he did not know that the approaching, or departing train, was within the block and hence was attentive. His hearing was good. He was at all times about seventy-one

and one-half feet from the track. There was nothing to contradict the affirmative testimony that:

> "* * * *there was nothing to prevent him from hearing the bell or whistle, if one had been sounded.*" (R. 54.)

Nagle was driving a car which did not make unnecessary or unusual noise; he had driven the same car before, and heard the whistle of trains while driving the same car. The other witness, Athletic Coach Quigley, heard no warning whistle, as found by the opinion (R. 70). The order of the trial judge recites:

> "The evidence is all on the part of the plaintiff and we assume that it is all true." (R. 63.)

This case is strictly within the rule applied in *Northern Pacific Railroad Company* v. *Freeman*, 174 U. S. 379, thus:

> "There was testimony from several witnesses in the neighborhood tending to show that no whistle was blown by the engineer as the train approached the crossing. There was also testimony of the conductor, engineer and fireman that the whistle was blown. As the majority of plaintiff's witnesses *were so located that they would probably have heard the whistle if it had been blown*, there was a conflict in the evidence with respect to defendant's negligence which was properly left to the jury."

In *Detroit Southern R. Co.* v. *Lambert*, 150 Fed. 555, l. c. 557, the court states the same rule:

> "As to the question of signals, six witnesses testified for defendant below that signals were given, while four witnesses for the plaintiff below testified

they did not hear any whistle blown or bell rung. If we had the right to pass upon it, we should say that the weight of the testimony on this point undoubtedly was for the railway company, *but since some of the plaintiff's witnesses were where they ought to have heard the whistle, if it was blown,* it seems to us, taking the rule laid down in *U. P. R. Co.* v. *Freeman,* 174 U. S. 379, that there was a conflict of testimony which was properly left to the jury."

Justice Lurton participated in this decision.

In *Lehigh Valley Ry. Co.* v. *Mangam,* 278 Fed. 85, l. c. 88, it is said:

"If the witnesses who testified that the bell was not rung or the whistle sounded *were so located that they would probably have heard either one or the other, it was proper to submit their testimony to the jury.*"

Nagle was so located.

In *C. & O. Ry. Co.* v. *Steele,* 84 Fed. 93, Justice Lurton, with the concurrence of the late Chief Justice Taft, affirmed a judgment for the death of two brothers at a railway crossing, based on negative evidence as to failure to give signals.

In Jones, Com. on Ev., Vol. 1, page 37, it is said:

"Where positive testimony that signals were given is met by testimony in direct denial by witnesses who could well have heard them if they had been given, it is generally held that the latter testimony is positive in character equally with the former, so

that in a jury case the court is not at liberty to determine the issue by granting a non-suit or directing a verdict."

Wigmore on Evidence 1068, 1071, Vol. 1, says:

"Courts have often been asked to exclude testimony based upon what may be called negative knowledge, i. e., testimony that a fact did not occur founded the witness's failure to hear a fact which he would supposedly have heard or seen if it had occurred. But there is no inherent weakness in this kind of knowledge. It rests on the same data of the senses. It may even sometimes be stronger than affirmative impression. The only requirement is that the witness should have been so situated that in the ordinary course of events he would have heard or seen the fact had it occurred.

Nevertheless, from some source not traceable there hinges in the judicial mind in many quarters an antiquated notion that negative impressions are not so probative as affirmative impressions. * * * Modern psychology sneers at the law's crude assumption that the complexities of human perception can be handled by some rules of thumb about negative testimony and the like."

In *Herrell* v. *Ry.*, 322 Mo. 551, Syl. 1, it is said:

"Testimony by a witness that he was standing within fifty feet of the whistling post, situated thirteen hundred feet from the crossing, and watched the train from the time it came in sight about a mile from the post until it passed him, and continued to watch it until it crossed the public road, and that at no time was the whistle sounded or the bell rung, and testimony by the injured plaintiff and other witnesses that they heard neither whistle nor bell, although they were in position to hear had

the whistle been sounded or the bell rung, is not negative evidence, but positive, and sufficient to sustain a charge that no statutory signal was given, and a common law charge that no warning or signal was given."

R. S. 721 and 914 operated to make the law there stated binding on the trial court.

As to Excessive Speed.

Respondent sought to have its rights determined upon the theory that the crossing in question was a grade crossing in the open country, but the facts here take the crossing out of the class known as a crossing in the open country. It was charged with knowledge that the crossing was opposite a crowded college and was used by the students and professors, and especially used on Sunday afternoons by visiting relatives. The students mostly lived at the college in dormitories, and on Sunday, in particular, there was more or less activity about the college grounds, more on Sunday than during the ordinary week day, on account of the visiting (R. 53).

Eighty-five feet west of the crossing the city limits of St. Marys began. A city ordinance prohibited the operation of a train "within this city at a rate of speed in excess of 20 miles per hour, nor in any manner which is dangerous to public safety," and provided a fine for violation thereof (R. 61).

The witness Quigley did not live on the college grounds. He lived at St. Marys and within the city limits (R. 33), 385 feet west of the center of the crossing and south of the track (R. 33). When the train passed Quigley approximately 400 feet west of the scene of the col-

lision, it was going at a tremendous speed and at least 50 miles an hour within the city limits (R. 58). The train was two hours late (R. 58), was seeking to make up time, could have been stopped in 1,000 feet at 60 miles an hour, but was not stopped until it traveled 1,752 feet west of the scene of the collision, and no bell or whistle warned the persons using the crossing of its approach at that terrific speed or warned the inhabitants of the city into which it crashed in violation of its ordinance of the fact that it was coming at an unusual time at said terrific speed.

In other words, appellee drove its death-dealing machine at the time and place in question as though the lives of the persons in said vicinity were unprotected by the laws. This short record shows that the acts of commission and omission of the appellee and its employees were grossly negligent, manifested reckless indifference and conscious disregard of the safety of human life and limb. Such terrific speed with warning under such circumstances would have been grossly negligent, but without warning, in violation of the Kansas statute, it was nothing more or less than reckless or wanton conduct, which was criminal.

In 52 C. J. 266, 267, the applicable law has been stated:

> "Where the servants or employees of a railroad company are guilty of wantonness or willfulness in inflicting an injury at a railroad crossing, the railroad company is liable therefor, notwithstanding contributory negligence on the part of the person injured. To constitute willfulness or wantonness the railroad employees must have done the negligent acts with the knowledge and consciousness that injury would probably result; a formed intent to injure or kill is not essential. Whether or not the

conduct of a company's servants in a particular case amounts to willfulness or wantonness depends on the circumstances of the case."

And in any event the question was for the jury (52 C. J. 468-469).

As pointed out in *Broussard* v. *Louisiana Western R. Co.*, 140 La. 517, 73 S. 606:

> "A speed of 30 miles an hour over a much-used crossing at the boundary line of the corporate limits of itself constitutes negligence rendering the company liable for the death of one killed by a train, *although the city ordinance limiting speed of trains was not applicable to the particular crossing.*"

What might not be considered excessive speed over a crossing if the statutory or other signals were given, yet may become excessive where they are not and the question is for the jury.

Norfolk, etc., R. Co. v. *Holbrook*, 27 F. (2d) 326.
Kelly v. *Director Gen. of Railroads*, 274 Pa. 470.
Schwartz v. *Delaware, etc., R. Co.*, 218 Pa. 187.

"Railroad had duty of not operating trains through village at greater speed than ordinary care warranted."

Railroad Co. v. *Van Dorp*, 173 N. E. 445.

"Special conditions, such as much-frequented crossing, may raise common-law duty on part of railroad to reduce speed on coming in sight of crossing."

Railroad v. *Jackson*, 130 So. 388.
Hines v. *Moore*, 124 Miss. 500, 87 S. 1.

It is negligence to run over a crossing at a high rate of speed without giving proper signals.

Morris v. *Railway*, 27 Fed. (2d) 326.

In *Central of Ga. Railway* v. *Pope*, 127 Southern 85, it is held that it is wanton conduct to run a train at a high rate of speed over a crossing without signals.

So that the evidence abundantly established negligent failure to whistle or warn and wantonly excessive speed.

The last chance rule as stated by the Court of Appeals only applies to trespassers or others for whom the trainmen are not required to keep a lookout and as stated and applied by said court there is a conflict with the general law on the question necessitating reversal.

The petition charged and the evidence tended to show that defendant

> "• • • operated its said train in a westwardly direction past the said college, through said thickly populated and traveled vicinity, over the said intersecting northbound public road at a high, dangerous and excessive rate of speed."

Those facts required the trainmen to be on the lookout.

The foregoing charge is coupled with the charge that

> "• • • defendant was negligent in that it failed to sound any warning of the approach of the said train, notwithstanding the said defendant knew and by the exercise of ordinary care could have known, and had notice and knowledge, that the said automobile in which said deceased was riding and the said deceased was *approaching and in a position of peril* while *turning towards* and *moving towards*

and *moving on the said track,* in time by the exercise of ordinary care in the use of the means at the command of said defendant, to have avoided the collision and injury to the deceased, either by *giving warning* of the approach of said railroad train, or by slackening the speed thereof, or by stopping the said train, but that defendant negligently neglected so to do."

The answer admits the allegation that the automobile and its occupants were:

"* * * approaching and in a position of peril while turning towards and moving towards and moving on the said track."

An examination shows that paragraph III of the answer (Tr. 17-18) does not contain a general denial. The denials are all in said paragraph. The denials are specific and there is no denial of the peril *or of its existence as charged.* The answer merely denies:

"* * * that defendant knew, or by the exercise of ordinary care it could have known, and denies that it had notice or knowledge, that the automobile in which Ella Andlauer was riding was approaching or in a position of peril in time by the exercise of ordinary care by the use of the means at the command of the defendant to have avoided collision or injury to Ella Andlauer, and denies that defendant knew, or by the exercise of ordinary care could have known, that said Ella Andlauer was in a position of peril or coming into a position of peril in time to have given a warning of the approach of defendant's train or to slacken the speed thereof, or to stop the train in time to have avoided collision or injury."

The Conformity Act made Section 776, R. S. Mo. 1929, applicable to said answer. Said section provides:

> "The answer of the defendant shall contain: First, a general or specific denial of each material allegation of the petition controverted by the defendant, or any knowledge or information thereof sufficient to form a belief."

The answer in paragraph III to each count did not contain either a general or special denial of the material allegation alleging the peril of deceased

> "While turning towards and moving towards and moving on the said track."

The special denial merely denies knowledge, actual or constructive, of the existence of the peril, *but not in the manner required by the statute.*

In *Revely* v. *Skinner,* 33 Mo. 98, it is said, l. c. 100:

> "Our statute requires that the answer of the defendant shall contain a special denial of each material allegation of the petition, controverted by the defendant, or of any *knowledge* or *information* thereof sufficient to form a belief, and every material allegation not so controverted is, for the purposes of the action, to be taken as true. The answer of Charlotte states that she has no information sufficient to form a belief, but does not state that she has no knowledge, etc. This section of our practice act is in the precise language of the New York code, and it has been repeatedly held by the Supreme Court of that state that the defendant must aver that he has neither *knowledge* nor *information,* and the averment of one without the other is insufficient to controvert a material allegation. (*Edwards* v. *Lent,* 8 Howard's Practice, 28; 1 E. D. Smith, 554; 20 Barb. 348.)"

In *State ex rel. Townsend* v. *Mueller,* 330 Mo. 641, l. c. 647, in June, of last year, the Missouri Supreme Court *en banc* reiterated the above doctrine, saying:

> "The return contains no general denial The answer to each paragraph of the petition is separate, specific and in every instance where the matter is pertinent states that the respondent has no knowledge of the facts alleged.
>
> "This does not tender an issue on such facts; they thus stand admitted under Section 776, R. S. 1929, which requires that an answer shall contain either a general or specific denial of the facts stated in the petition as a denial of 'any knowledge or information thereof sufficient to form a belief.' To say that the respondent has no knowledge of the facts alleged, does not meet the requirements of that statute."

From the foregoing it appears that the allegation that defendant had no knowledge of the peril of the deceased amounted to an admission of the allegations of the petition with reference to the *existence of the peril* and defendant's knowledge thereof *as alleged* under the time-honored rule that "the averment of one *without the other* is insufficient to controvert a material allegation." (*Revely* v. *Skinner,* 33 Mo., l. c. 100.) Furthermore, in the IV paragraph of said answer it is alleged:

> "The said * * * Ella Andlauer * * * failed to look for said train before going upon the track in front of the approaching train in time so that she could have notified her husband, who was driving said automobile, of the approach of said train before he had driven said automobile upon the track in front of said train and in time to have avoided collision."

This is a similar allegation in the answer as to Mr. Andlauer.

The answer also alleged that the train was visible for more than one mile away. These allegations in the answer were admissions that the automobile could be seen by the train employees on turning toward, approaching and going on the intersection for more than one mile east of same. Said allegations also established as a solemn admission that the automobile and those riding in it, to the knowledge of the trainmen, were in a position of peril as alleged in the petition. In *Allen* v. *Purvis*, 30 S. W. (Mo.) (2d) 196, l. c. 199, 200, the court said:

> "It will be observed that the question of obliviousness was not submitted to the jury. It is in effect argued that under the facts and circumstances in this case a position of imminent peril did not arise until the driver of the automobile knew or could have known that the pedestrian was oblivious to the approach of the automobile, or not being oblivious, was in such a position or condition as to be unable to extricate herself; and that this case presents one of the instances where obliviousness of danger on the part of plaintiff is necessary to make the situation in which she is placed one of peril. Appellant cites *Clark* v. *A., T. & S. F. R. Co.*, 319 Mo. 865, 6 S. W. (2d) 954, and numerous other cases instructive upon the subject of obliviousness in a given situation, and of facts constitutive of a cause of action under the humanitarian rule.
>
> But the point made by appellant cannot be maintained because the plea of contributory negligence charged that plaintiff was 'careless and negligent in failing to properly look out for the approach of automobiles.' That portion of the answer has been set out in the statement, and the contents thereof, under the law in this state, is equivalent to a statement that plaintiff was oblivious to her danger, and

> is an admission of such fact. It is unnecessary to prove an admitted fact, and equally unnecessary to require a finding of such fact by an instruction."

In *Woods* v. *Moffitt*, 38 S. W. (2d) 525, l. c. 528, the court said:

> "There is no merit in the contention that the evidence was insufficient to support the verdict under the humanitarian rule. It is said that there is no proof to show either when or where respondent got into a position of peril, that it is not possible to determine whether defendant could have avoided injuring him after he got in such position, and to submit the case to the jury was merely to permit a guess verdict. Such propositions wane in the light of the pleadings and proof. The conclusion is inevitable that plaintiff was in peril from the approaching car behind him; and, furthermore, peril and obliviousness were not contested issues, but were admitted by the answer. *Allen* v. *Purvis* (Mo. App.) 30 S. W. (2d) 196, 200, and cases cited."

In *McKenzie* v. *Ry.*, 216 Mo. 19, it is said:

> "It is fundamental that what is admitted by the pleadings is unnecessary to be shown by the testimony."

This general rule of law was made applicable in the courts below by the conformity act (R. S. 914). Hence the fact of peril from the time the automobile began to turn and the trainmen's knowledge thereof was established by defendant's answer.

The opinion of the court finds the facts as follows:

> "Here, the physical facts and surrounding circumstances, all practically undisputed, would seem conclusively to show that the occupants of this car, heedlessly, and without looking or listening, drove onto this crossing without any knowledge of the approach of the train. They knew that they were approaching the crossing; they knew exactly where they were and where the crossing was. They had an unobstructed view of the approaching train, yet the car neither stopped, slackened its speed, increased its speed, nor turned to the right nor to the left, but went steadily forward. These physical facts and surrounding circumstances overcome all presumption as to the exercise of ordinary care, and conclusively establish that both the occupants of this car were guilty of contributory negligence, unless, as contended by appellant, the doctrine of discovered peril can be invoked." (R. 70.)

This statement of the facts brings this case within the principle stated in Section 16 of the report of the American Law Institute, Volume 10.

Said statement is:

> "Section 16. Last Clear Chance—Negligently Inattentive Plaintiff. A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant (a) knew or had reason to know of the plaintiff's situation, and (b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm."

It is also on all fours (with the exception that the comment assumes the statutory whistle was blown) with the facts stated in the comment on said section in the illustration given therein:

> "Thus, if an engineer of a train approaching a level highway crossing sees a traveler approaching the track on foot or in a vehicle, he is not required to take any steps either to warn the traveler by an *additional blast* of his whistle or to bring the train under special control, since he is entitled to assume that the traveler has discovered or will discover the oncoming train and will stop before reaching the crossing. However, it is not necessary that the circumstances be such as to convince the defendant that the plaintiff is inattentive and, therefore, in danger. *It is enough that the circumstances are such as to indicate a reasonable chance that this is the case. Even such a chance that the plaintiff will not discover his peril is enough to require the defendant to make a reasonable effort to avoid injuring him.* Therefore, if there is anything in the demeanor or conduct of the plaintiff which to a reasonable man in the defendant's position would indicate that the plaintiff is inattentive and, therefore, will or may not discover the approach of the train, the engineer must take such steps as a reasonable man would think necessary under the circumstances. If a train is at some little distance the blowing of a whistle would ordinarily be enough."

The opinion finds that the physical facts and surrounding circumstances, all practically undisputed, would seem conclusively to show that the occupants of this car, heedlessly and without looking or listening, drove onto this crossing without any knowledge of the approach of the train.

If the author of the opinion could gather from the physical facts and surrounding circumstances detailed in the evidence that the occupants of the car, heedlessly and without looking or listening, drove onto the crossing without any knowledge of the approach of the train, why should not the trainmen, whose duty it was to be on the lookout and who were charged with the duty of exercising reasonable care not to injure the deceased, have seen and known that which the author of the opinion said was evident from the physical facts and circumstances?

The opinion gives two reasons why the last chance doctrine did not apply. In the opinion, the court says that unless the employees of the railroad company could assume under the physical facts and circumstances which demonstrated to the Court of Appeals that the plaintiffs, heedlessly and without looking or listening, drove onto the crossing without any knowledge of the approach of the train, failed to give any intimation to the trainmen that they were heedlessly and without looking or listening, driving onto the crossing. The opinion says if they could not so assume,

> "—then it would be necessary to stop the train at every highway crossing, wherever situate, or to approach it at such speed as to be able to stop the train whenever the train crew observed anyone approaching a crossing." (R. 71.)

The trouble with the statement is that the very purpose for which whistles or bells are attached to trains is to enable the trainmen to warn people in the situation of plaintiff's intestates as they drove toward the tracks. In the comment on Section 16, Am. Law Institute, Vol. 10, it is said:

"If a train is at some little distance *the blowing of a whistle would ordinarily be enough,* until it is apparent that the whistle is either unheard or disregarded."

The opinion omits to refer to the fact that the blowing of a whistle would have stopped the automobile and obviated the necessity of "stopping the train at every highway crossing or to approach it at such speed as to be able to stop the train whenever the train crew observed anyone approaching the crossing."

The Court of Appeals applies to persons in that Circuit on the public highways crossing railroad tracks the same rule which is applied to persons who are in peril at places where the persons injuring them have no duty to be on the lookout for them and have no reason to anticipate their presence. In other words, the Court of Appeals for that Circuit holds that all persons on the highway crossing railroad tracks are trespassers, and that the railroad company is under no duty or obligation to look out for them.

The English rule is that if the peril, although not actually discovered, could have been discovered by defendant in the exercise of ordinary care in time to have avoided the injury, the defendant is liable. *Sphingett* v. *Ball,* 4 F. & F, 472.

Even if actual knowledge was necessary herein to a recovery, yet such knowledge was shown by the facts and circumstances.

In *Wolosszanowski* v. *N. Y. C. R. R. Co.,* 254 N. Y. 206, the court said (as to a trespasser):

> "Knowledge may be established by circumstantial evidence, in the face even of professions of ignorance (cf. *Bragg* v. *Central New England Ry. Co.*, 228 N. Y. 54) but knowledge there must be, or negligence so reckless as to betoken indifference to knowledge."

The facts show that the trainmen incapacitated themselves from saving the deceased by failing to keep that lookout, which the law required them to keep, for persons using that highway. The fact that they failed to keep a lookout operated to excuse them from making any attempt to save human life under the opinion and decision of the courts below. For in the opinion, it is said of the last chance doctrine that it

> "* * * is limited to cases in which the defendant actually discovers the person injured and his peril in time to avoid the injury. *It does not include cases where, by the exercise of ordinary care, the plaintiff might have made such discovery in time to avoid the injury.*"

The British court has recently ruled in *British Columbia Electric Company* v. *Loach*, 1916 A. C. 719, 10 British Ruling Cases 882, that whenever railroad operatives incapacitate themselves or the train, either negligently or willfully, from saving life or property from the loss occasioned or about to be occasioned by a collision with the train on a public crossing, then the railroad company is liable even though the killed or injured person was guilty of contributory negligence. This principle applies and operates to render the railroad company liable, whether the incapacitating circumstance be due to failure to keep a lookout, to driving at incapacitating, ex-

cessive speed or to sending a train out without proper stopping appliances. In said case, the jury found in response to special questions that the deceased was guilty of negligence which contributed to his death and that said guilt was occasioned by not taking extraordinary precautions to see the road was clear. The jury also found in that case that the railroad company could have avoided the accident if the brakes on the train "had been in effective condition."

The principle applied in *British Columbia Electric Company* v. *Loach, supra,* is sanctioned by the great name of Haldane. A suit by the owner of the vehicle on which the deceased was killed in *British Columbia Electric Company* v. *Loach, supra,* came before the Canadian Supreme Court in *Columbia Bithulitic, Limited, Appellant,* v. *British Columbia Electric Railway Company,* 55 Can. S. C. 1. This was a companion case to the Loach case. The evidence at the trial eliminated the defective brake as a producing cause of the injury but left the element of excessive speed. The question was whether or not under the decision of the Privy Council in the Loach case there could be a recovery because of incapacitating excessive speed. Ruling that under the principles of said case there not only could be a recovery, but must be, it was held, l. c. 29-30:

> "If the rate of speed under the circumstances amounted to negligence, and disability to avoid the collision resulted from it, it was just as truly 'ultimate' negligence which makes the defendant liable, as was the sending out of the car with a defective brake, which their Lordships so characterized in Loach's case because of the motorman's consequent incapacity to avoid killing the unfortunate Sands.

> That it would be negligent, without the warrant of statutory authority, to drive a railway train or a tram car when nearly approaching an unprotected highway level crossing at a speed approximately 40 miles an hour (as was done in this case) is indisputable. Under some circumstances it might be more than merely negligent; it might be criminal."

In the same case it was held that the statute providing for the "blowing of a steam whistle" permitted a speed "which at common law would be illegal" and that to keep the speed legal the train and speed must be accompanied by a whistle at crossings (1. c. 37):

> "The learned trial judge found—in my opinion properly—that the defendant's tram car was running at an excessive rate of speed in approaching the crossing. He also found that there had been contributory negligence by plaintiff's driver. He further found upon sufficient evidence that but for the disability created by the excessive and unreasonable rate of speed the motorman could have avoided the collision notwithstanding such contributory negligence. I am, with great respect, of the opinion that on these findings his conclusion that the defendant company was liable under the law as laid down in *Loach* v. *B. C. Electric Railway Company* was sound and should not have been disturbed."

Because of the applicability of the above decisions to the question now before the court we reproduce the decision in *British Columbia Electric Company* v. *Loach*, 10 British Ruling Cases 882, in its entirety:

"*British Columbia Electric Ry. Co., Limited, Appellants, and Loach, Respondent,* (1916) A. C. 719, 85 L. J. P. C. N. S. 23, 113 L. T. N. S. 946.

(July 26, 1915)

Present: Viscount Haldane, Lord Parker of Waddington and Lord Summer.

Appeal from a judgment of the Court of Appeal of British Columbia (January 6, 1914) reversing the judgment of the judge at the trial with a jury.

The respondent, as administrator of the estate of Benjamin Sands, deceased, brought an action against the appellants under the Families Compensation Act (R. S. B. C. 1911, Chap. 82) to recover damages in respect of the death of the deceased, which he alleged to have been caused by the negligence of the appellants. The above-mentioned act is in substantially the same terms as the Fatal Accidents Act 1846 (9 and 10 Vict., Cnap. 93, Imp.). The appellants denied the alleged negligence, and pleaded, *inter alia,* that the death of Sands was caused by his contributory negligense.

The accident which gave rise to the action occurred while the deceased was being driven by another man in a wagon called a 'rig.' The highway along which the wagon was proceeding crossed the appellants' track on the level at a point near a station and an orchard. While the wagon was being driven across the track it was run into by an electric car belonging to the appellants, with the result that the deceased was killed.

The following were the questions left to the jury by Murphy, J., at the trial and the answers thereto:

1. Was the defendant company guilty of negligence which was the proximate cause of the accident? A. Yes.

2. If so, in what did such negligence consist? A. Excessive speed under the circumstances; namely, a single track was in use for both-way passengers, and it was proved that passengers were waiting whose destination was unknown to the motorman or con-

ductor. Therefore the speed should have been slackened and the car brought under complete control approaching the station. Insufficient space between the orchard and station for observing approach of cars from the north.

3. Was the deceased, as distinguished from the driver of the rig, guilty of negligence which contributed to the accident? A. Yes.

4. If so, in what did such negligence consist? A. By not taking extraordinary precautions to see the road was clear.

5 and 6. If both the company and the deceased were guilty of negligence, could the company then have done anything which would have prevented the accident? If so, what? Answer fully. A. Yes; the motorman could have stopped the car if the brake had been in effective condition.

(Questions 7 to 10 were as to whether the driver of the rig, as distinguished from the deceased, had been negligent, and whether the appellants could have avoided the result of that negligence. The jury answered as in reply to questions 3 to 6.)

11. (a) Damages for widow? A. 5,000 dollars. (b) Damages for each child? A. 2,500 dollars.

After argument the learned judge gave judgment for the appellants on the ground that, the jury having found that both the defendants and the deceased had been negligent, there was no evidence of any further negligence on the part of the defendants.

Upon appeal the Court of Appeal by a majority (Irving, Martin and Galliher, J. J. A., Macdonald, C. J. A., and McPhillips, J. A., dissenting) reversed the above decision and gave judgment for the plaintiff for the amounts found by the jury.

* * * * * * *

This is an appeal from a judgment of the Court of Appeal of British Columbia in favor of the administrator of the estate of Benjamin Sands, who was run down at a level crossing by a car of the appellant

railway company and was killed. One Hall took Sands with him in a cart, and they drove together on to the level crossing, and neither heard nor saw the approaching car till they were close to the rails and the car was nearly on them. There was plenty of light and there was no other traffic about. The verdict, though rather curiously expressed, clearly finds Sands guilty of negligence in not looking out to see that the road was clear. It was not suggested in argument that he was not under a duty to exercise reasonable care, or that there was not evidence for the jury that he had disregarded it. Hall, who escaped, said that they went right on to the 'track,' when he heard Sands, who was sitting on his left say, 'Oh,' and looking up saw the car about 50 yards off. He says he could then do nothing, and with a loaded wagon and horses going 2 to 3 miles an hour he probably could not. It does not seem to have been suggested that Sands could have done any good by trying to jump off the car and clear the rails. The car knocked cart, horses and men over, and ran some distance beyond the crossing before it could be stopped. It approached the crossing at from 35 to 45 miles an hour. The driver saw the horses as they came into view from behind a shed at the crossing of the road and the railway, when they would be 10 or 12 feet from the nearest rail, and he at once applied his brake. He was then 400 feet from the crossing. If the brake had been in good order it should have stopped the car in 300 feet. Apart from the fact that the car did not stop in time, but overran the crossing, there was evidence for the jury that the brake was defective and inefficient, and that the car had come out in the morning with the brake in that condition. The jury found that the car was approaching at an excessive speed and should have been brought under complete control, and although they gave as their reason for saying so the presence of possible passengers at the station by the crossing, and not the possibility of

vehicles being on the road, there can be no mistake in the matter, and their finding stands. It cannot be restricted, as the trial judge and the appellants sought to restrict it, to a finding that the speed was excessive for an ill-braked car, but not for a properly braked car, or to a finding that there was no negligence except the 'original' negligence of sending the car out ill-equipped in the morning.

Clearly, if the deceased had not got on to the line, he would have suffered no harm in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car and would have kept out of mischief. If the matter stopped there, his administrator's action must have failed, for he would certainly have been guilty of contributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered.

It was for the jury to decide which portions of the evidence were true, and under proper direction, to draw their own inferences of fact from such evidence as they accepted. No complaint was made against the summing up, and there has been no attempt to argue before their Lordships that there was not evidence for the jury on all points. If the jury accepted the facts above stated, as certainly they well might do, there was no further negligence on the part of Sands after he looked up and saw the car, and then there was nothing that he could do. There he was, in a position of extreme peril and by his own fault, but after that he was guilty of no fresh fault. The driver of the car, however, had seen the horses some perceptible time earlier, had duly applied his brakes, and if they had been effective he could, as the jury found, have pulled up in time. Indeed, he would have had 100 feet to spare. If the car was 150 feet off when Sands looked up and said, 'Oh,' then each had the other in view for

50 feet before the car reached the point at which it should have stopped. It was the motorman's duty, on seeing the peril of Sands, to make a reasonable use of his brakes in order to avoid injuring him, although it was by his own negligence that Sands was in danger. Apparently he did his best as things then were, but partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping, as he could otherwise have done. On these facts, which the jury were entitled to accept and appear to have accepted, only one conclusion is possible. What actually killed Sands was the negligence of the railway company, and not his own, though it was a close thing.

Some of the judges in the courts below appear to have thought that because the equipment of the car with a defective brake was the original cause of the collision, and could not have been remedied after Sands got on the line, no account should be taken of it in considering the motorman's failure to avoid the collision after he knew that Sands was in danger. 'You cannot charge up the same negligence under different heads,' said Murphy, J., at the trial, 'you cannot charge it up twice.' 'On the question of ultimate negligence,' he observed, 'that negligence must arise on the conditions as existing at the time of the accident. It would, of course, be absurd to say the company had any opportunity between the time that this rig appeared upon the track and the collision to remedy any defect in the brake. If there was such a defect, I think it was original negligence, and not what may possibly be termed "ultimate negligence".'

In the Court of Appeal, Macdonald, C. J. A., delivering a dissentient judgment in favor of the present appellants, said: 'Where one party negligently approaches a point of danger, and the other party, with like obligation to take care, negligently approaches the same point of danger, if there arises a

situation which could be saved by one and not by the other, and the former then negligently fail to use the means in his power to save it, and injury is caused to the latter, that failure is designated ultimate negligence, in the sense of being the proximate cause of the injury. In this case it is sought to carry forward, as it were, an anterior negligent omission of the defendants, though continuing, it is true, up to the time of the occurrence, and to assign to it the whole blame for the occurrence, although by no effort of the defendants or their servants could the situation at that stage have been saved.'

So, too, McPhillips, J. A., also dissenting, said: 'Upon the evidence, whether it was because of defective brakes or any of the acts of negligence found against the defendants, none of them were acts of negligence arising after the act of contributory negligence of the deceased, and cannot be held to be acts of negligence which, notwithstanding the later negligence of the deceased, warrant judgment going for the plaintiff. * * * The motorman, after he saw the vehicle, could not have stopped the car * * * therefore, as nothing could be then done by the motorman to remedy the ineffective brake, the want of care of the deceased was the direct and effective contributory cause of the accident resulting in his death.'

These considerations were again urged at their Lordships' bar under somewhat different forms. It was said (1) that the negligence relied on as an answer to contributory negligence must be a new negligence, the initial negligence which founded the cause of action being spent and disposed of by the contributory negligence. Further, it was said (2) that if the defendants' negligence continued up to the moment of the collision, so did the deceased's contributory negligence, and that this series, so to speak, of replications and rebutters finally merged in the accident without the deceased ever having

been freed from the legal consequence of his own negligence having contributed to it.

The last point fails because it does not correspond with the fact. The consequences of the deceased's contributory negligence continued, it is true, but after he had looked, there was no more negligence, for there was nothing to be done, and as it is put in the classic judgment in *Tuff* v. *Warman*, (1858) 5 C. B. N. S. 573, 585, 141 Eng. Reprint 231, 27 L. J. C. P. N. S. 322, 5 Jur. N. S. 222, 6 Week. Rep. 693, 19 Eng. Rul. Cas. 194, his contributory negligence will not disentitle him to recover 'if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff.'

As to the former point, there seems to be some ambiguity in the statement. It may be convenient to use a phraseology which has been current for some time in the Canadian courts, especially in Ontario, though it is not precise. The negligence which the plaintiff proves to launch his case is called 'primary' or 'original' negligence. The defendant may answer that by proving against the plaintiff 'contributory negligence.' If the defendant fails to avoid the consequences of that contributory negligence, and so brings about the injury, which he could and ought to have avoided, this is called 'ultimate' or 'resultant' negligence. The opinion has been several times expressed, in various forms, that 'original' negligence and 'ultimate' negligence are mutually exclusive, and that conduct which has once been relied on to prove the first cannot in any shape constitute proof of the second.

Here lies the ambiguity. If the 'primary' negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt it is not the 'ultimate' negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence is repeated or continued, and is

the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the 'ultimate' negligence which makes the defendant liable?

This matter was much discussed in *Brenner* v. *Toronto R. Co.*, (1907) 13 Ont. L. Rep. 423, when Anglin, J., delivered a very valuable judgment in the divisional court. The decision of the divisional court was reversed on appeal in (1907) 15 Ont. L. Rep. 195; (1908) 40 Can. S. C. 540, but on other grounds, and in their comments on the decision of the divisional court, Duff, J., in the Supreme Court, and also Chancellor Boyd in *Rice* v. *Toronto R. Co.*, (1910) 22 Ont. L. Rep. 446, 450, and Hunter, Ch. J., in *Snow* v. *Crow's Nest Pass Coal Co.*, (1907) 13 B. C. 145, 155, seem to have missed the point to which Anglin, J., had specially addressed himself.

The facts of that case were closely similar to those in the present appeal and it was much relied on in argument in the court below. Anglin, J., following the decision in *Scott* v. *Dublin & W. R. Co.*, (1861) 11 Ir. C. L. Rep. 377, 394, observed as follows. (13 Ont. L. Rep. 437, 439, 440): 'Again, the duty of the defendants to the plaintiff, breach of which would constitute "ultimate" negligence, only arose when her danger was or should have been apparent. Prior to that moment there was an abstract obligation incumbent upon them to have their car equipped with efficient emergency appliances ready and in condition to meet the requirements of such an occasion. Had an occasion for the use of emergency appliances not arisen, failure to fulfill that obligation would have given rise to no cause of action. Upon the emergency arising, that abstract obligation became a concrete duty owing to the plaintiff to avoid the consequences of her negligence by the exercise of ordinary care. • • • Up to that moment there was no such breach of duty to the plaintiff. In that sense the failure of the defendants to avoid the mischief, though the

result of an antecedent want of care, was negligence which occurred, in the sense of becoming operative, immediately after the duty, in the breach of which it consisted, arose. It effectively intervened between the negligence of the plaintiff and the happening of the casualty. But there is a class of cases where a situation of imminent peril has been created, either by the joint negligence of both plaintiff and defendant, or, it may be, by that of the plaintiff alone, in which, after the danger is or should be apparent, there is a period of time, of some perceptible duration, during which both or either may endeavor to avert the impending catastrophe. * * * If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes—a remote cause or a cause merely *sine qua non*—it is, in very truth, the efficient, the proximate, the decisive cause of the incapacity, and therefore of the mischief. * * * Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. * * *"

Their Lordships are of opinion that, on the facts of the present case, the above observations apply and are correct. Were it otherwise the defendant company would be in a better position, when they had supplied a bad brake but a good motorman, than when the motorman was careless but the brake efficient. If the superintendent engineer sent out the car in the morning with a defective brake, which, on seeing Sands, the motorman strove to apply, they would not be liable, but if the motorman failed to

apply the brake, which, if applied, would have averted the accident, they would be liable.

The whole law of negligence in accident cases is now very well settled, and, beyond the difficulty of explaining it to a jury in terms of the decided cases, its application is plain enough. Many persons are apt to think that, in a case of contributory negligence like the present, the injured man deserved to be hurt; but the question is not one of desert or the lack of it, but of the cause legally responsible for the injury. However, when once the steps are followed the jury can see what they have to do, for the good sense of the rules is apparent. The inquiry is a judicial inquiry. It does not always follow the historical method and begin at the beginning. Very often it is more convenient to begin at the end, that is, at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsibility for the wrongful act which has caused the damage. It is in search, not merely of a causal agency, but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purposes they are remote. Till that has been done there may be a considerable sequence of physical events, and even of facts of responsible human beings, between the damage done and the conduct which is tortious and is its cause. It is surprising how many epithets eminent judges have applied to the cause, which has to be ascertained for this judicial purpose of determining liability, and how many more to other acts and incidents which for this purpose are not the cause at all. 'Efficient or effective cause,' 'real cause,' 'proximate cause,' 'direct cause,' 'decisive cause,' 'immediate cause,' '*causa causans*', on the one hand, as against, on the other, '*causa sine qua non*,' 'occasional cause,' 'remote cause,' 'contributory cause,' 'inducing cause,' 'condition,' and so on. No doubt in the particular cases in which they occur they were thought to be

useful or they would not have been used, but the repetition of terms without examination in other cases has often led to confusion, and it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification.

In the present case their Lordships are clearly of opinion that, under proper direction, it was for the jury to find the facts and to determine the responsibility, and that upon the answers which they returned, reasonably construed, the responsibility for the accident was upon the appellants solely, because, whether Sands got in the way of the car with or without negligence on his part, the appellants could and ought to have avoided the consequences of that negligence, and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it. Their Lordships will accordingly humbly advise his Majesty that the appeal should be dismissed, with costs."

The physical facts in this case show that for some reason within the control of the railway company, or its servants, they either did not, or could not, avoid collision with the automobile, even after its peril became apparent. There was evidence tending to show that under the circumstances in question the train could be stopped in 1,000 feet. Yet it traveled 1,752 feet after it passed the crossing before stopping. The evidence of the Coach Quigley was that when the train was 385 feet west of the scene of the collision, it was still going fifty miles an hour and it took the train a full one third of a mile

before it stopped. The law presumes that the engineer and fireman saw the deceased approaching the track and on the track. (*Lynch* v. *Ry.*, 208 Mo. 1, l. c. 21-22.) The doctrine of the Loach case renders defendant liable.

It is true that the deceased, in the case at bar, had not placarded on themselves, or on their automobile, the words, in large letters, "We are helpless," "We are in peril."

They simply drove towards the track, without slackening or increasing or changing their speed. The fact that it did not change its speed was alone a fact from which the trainmen could have inferred that they were unconsciously going into peril. The rule is well stated in syllabi 5, *Chapman* v. *Railroad*, 217 Mo. App. 312, l. c. 313, thus:

> "Where automobile in which plaintiff was riding was in plain view of those in cab of approaching engine, was on engineer's side of engine, and could have been seen by those in charge of engine by exercise of ordinary care, *and automobile did not slow down*, in such case those in charge of the engine had no right to assume that the driver would stop before going upon the track, so as to excuse them from giving any warning whistle or ringing bell; evidence being that the automobile could have been stopped almost instantly."

l. c. 322, 323, the opinion is:

> "Do the facts justify the submission on the humanitarian doctrine? The automobile in which plaintiff was riding was in plain view of one in the engine cab of the approaching train from the time it started after plaintiff got in, and could have been seen by those in charge of the engine by the exercise of ordinary care, and especially by the engineer, as the

automobile was on the engineer's side. When the automobile turned west such fact evidenced an intention on the part of the driver to cross the track. The switch track was about twenty-five feet from the main track, and about the time the automobile went over the switch track the driver, Springer, shifted from low to second. If those in charge of the engine had been exercising the care required they would have seen that this automobile was approaching this track *with no indication of slowing down, and in such case they had no right to assume that the driver would stop before going upon the track.*"

Fact that there is no change in speed of automobile as it approaches crossing was evidence.

In *Gregory* v. *Ry.*, 270 S. W. 621, l. c. 623, the court said:

"* * * the jury might have found that the fireman was not keeping a lookout, as he said he was, or that, if he was keeping a lookout, *the appearance of the motorbus indicated that it was not going to stop.*"

And so herein.

The foregoing considerations and the facts found by the Court of Appeals demonstrate that the case could have been submitted to the jury on the ultimate negligence or last chance doctrine.

The statement of the last clear chance doctrine by the Circuit Court of Appeals, in the opinion below, shows that it wholly overlooked the opinion of this court in *Ellzey* v. *Kansas City Southern Ry. Co.*, and the opinion in the other Circuits directly in conflict therewith.

In Central Law Journal 215, it is said:

> "Indeed, no actual knowledge of the peril of the historic donkey in the highway was shown in the celebrated case of *Davies* v. *Mann*, 10 Mees & W. 546, 12 L. J. Exch. U. S. 10; 6 Jur. 954, 19, Eng. Rul. Cas. 190; the failure to discover and avoid the injury to him being the true ground of negligence."

Since the deceased had a right to rely upon the observance of the custom on the part of trains to slow down, and since mathematical calculation shows that they would have been north of the track some eighty feet before the train reached the crossing, and since the trainmen knew the speed at which they were approaching the crossing, this also was a circumstance which necessitated the blowing of a warning whistle or sounding of a bell, and as neither was blown or sounded, defendant failed in the performance of its last chance duty.

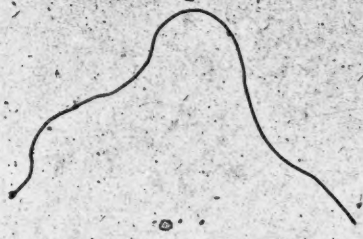
Another circumstance with knowledge of which the train operatives were charged was that the train was late and they were making up time. This court must judicially note that whatever the decisions may be with reference to the railroad track constituting a warning to travelers, yet if persons familiar with the location and familiar with the train schedules are about to cross, they will not be as careful as they would have been if they knew that a train was due. The deceased in this case were shown to have been familiar with the time this train passed every day, to-wit, an hour or two before they were killed, and since the trainmen knew that they were operating at an unusual time and at an unusual speed, they ought to know that persons familiar with train schedules would probably regulate their movements in accordance with the ordinary daily occurrences at that

crossing, and as well pointed out in the Chapman and Gregory cases, the fact that the automobile did not slow down was in itself a circumstance which operated to prevent the trainmen from properly assuming that it would do that which it could have seen it was not doing.

A reversal with appropriate directions is prayed.

Respectfully submitted,

WILLIAM BUCHHOLZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.



FILE COPY

In the Supreme Court of the United States

October Term, 1933.

No. 51.

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, *Petitioner*,

vs.

UNION PACIFIC RAILROAD COMPANY, *Respondent*.

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT.

C. A. MAGAW,
I. N. WATSON,
HENRY N. ESS,
PAUL V. BARNETT,
CHARLES V. GARNETT,
Attorneys for Respondent.

INDEX.

	PAGE
Preliminary Statement	1
Statement of Case	2-5
Summary of the Argument	6-8
Marcus Andlauer was guilty of contributory negligence as a matter of law	6, 9
Ellanore Andlauer was also guilty of contributory negligence as a matter of law	6, 12
Respondent cannot be held liable under the last chance doctrine	7, 20
There is no merit to petitioner's contention that his rights under the Seventh Amendment to the Constitution were violated by the action of the trial court in dismissing the case with prejudice rather than directing a verdict in favor of respondent	8, 25
Argument	9-36
Conclusion	37

Table of Cases Cited.

	PAGE
Atchison, T. & S. F. Ry. Co. v. McNulty, (C. C. A. 8) 285 Fed. 97	7, 14
Baltimore & Ohio R. R. Co. v. Goodman, 275 U. S. 66	6, 9
Barrett v. Shipley, 206 Pac. 430, 431	35
Beaver v. Taylor, 93 U. S. 46, 55	8, 28
Beckwith v. Bean, 98 U. S. 266, 284	8
Bohenik v. Delaware & Hudson Co., 49 Fed. (2nd) 722, 724 (C. C. A. 2) (certiorari denied, 284 U. S. 643)	8, 32
Bowman v. Railroad, 184 Fed. 697 (C. C. A. 8)	8
Bradley v. Mo. Pac. Ry. Co., 288 Fed. 484, 487	6, 11, 12
Brommer v. Railway Co., (C. C. A. 3) 179 Fed. 577, 581	7, 14
Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 39	8, 31
Chicago & E. I. Ry. Co. v. Sellars, (C. C. A. 8) 5 Fed. (2nd) 31	6, 14
Coughran v. Bigelow, 164 U. S. 301, 307	8, 31
Davis v. C. R. I. & P. R. Co., (C. C. A. 8) 159 Fed. 10	7, 15
Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 82	8, 27
Fluckey v. Southern Ry. Co., (C. C. A. 6) 242 Fed. 468	7, 14
Garrett v. Pennsylvania R. Co., (C. C. A. 7) 47 Fed. (2nd) 10	7, 14, 16
Gasoline Products Co. v. Champlin Co., 283 U. S. 494, 499	8, 30
Guerini Stone Co. v. Carlin Construction Co., 248 U. S. 334, 348	8, 28

PAGE

Hall v. Railway Co., (C. C. A. 3) 244 Fed. 104..... 7, 14
Hall v. Small, 178 Mo. 629, 634..... 34
Harvey v. Tyler, 2 Wall. 328, 339..... 8
Herron v. Southern Pacific Co., 283 U. S. 91..... 8, 31

Illinois Central Ry. Co. v. Ackerman, (C. C. A. 8) 144 Fed. 959 ..... 7, 22

Kutchma v. Railway Co., (C. C. A. 8) 23 Fed. (2nd) 183 ..... 6, 14

Little v. Hackett, 116 U. S. 366..... 7, 20

Mouler v. American Ins. Co., 111 U. S. 335, 337..... 8

Noble v. Railway, (C. C. A. 8) 298 Fed. 381..... 6, 14

Oscanyan v. Arms Co., 103 U. S. 261, 264..... 8, 31

Parramore v. Railroad, (C. C. A. 8) 5 Fed. (2nd) 912 ..... 6, 14
Pennington v. Southern Ry. Co., (C. C. A. 5) 61 Fed. (2nd) 399 ..... 7, 14
Phila. & R. Ry. Co. v. LeBarr, (C. C. A. 3) 265 Fed. 129 ..... 7, 14
Phillips v. Davis, (C. C. A. 3) 3 Fed. (2nd) 798..... 7, 14

Railroad v. Houston, 95 U. S. 697..... 6, 10
Railway Co. v. Divine, 39 Fed. (2nd) 537..... 15
Robinson & Co. v. Belt, 187 U. S. 41, 50..... 8, 28

Slocum v. New York Life Insurance Co., 228 U. S. 364 33
Southern Pacific Co. v. Wright, 248 Fed. 261..... 17
Southern Pacific Co. v. Stephens, 24 Fed. (2nd) 182.. 19

TABLE OF CASES CITED—Continued.

PAGE

Southern Ry. Co. v. Priester, (C. C. A. 4) 289 Fed. 945, 949 ..... 7, 14

Summers v. Denver Tramway Co., (C. C. A. 10) 43 Fed. (2nd) 286 ..... 7, 15

Toledo, St. L. & W. R. R. Co. v. Allen, 276 U. S. 165, 173 ..... 7, 23

Trenholm v. Railway Co., 8 Fed. (2nd) 452 18

United States v. U. S. Fidelity Co., 236 U. S. 512, 529 ..... 8, 27, 28

Statute Cited.

40 Stat. at L. 1181 (Tit. 28, Sec. 391, U. S. C. A.) 8, 29

Text Book Cited.

4 C. J. 1171 34

In the Supreme Court of the United States

October Term, 1933.

No. 51.

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, *Petitioner,*

vs.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT.

PRELIMINARY STATEMENT.

At the time this brief went to press on November 6, 1933, petitioner had served upon respondent only a galley proof of his proposed brief. Due to the shortness of time intervening between the dates of the receipt of the printed record, petitioner's brief (in galley form) and the oral argument before this Court, it is impossible for respondent to await the final draft of petitioner's brief before completing its brief. Hence, this brief must, of necessity, be confined to an answer to the brief in galley form served upon respondent by petitioner.

STATEMENT OF CASE.

This is an action brought by petitioner against respondent for wrongful death of petitioner's decedents, Marcus and Ellanore Andlauer. At the conclusion of petitioner's evidence, the District Court ruled that petitoner was not entitled to recover. From that judgment petitioner prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit, which affirmed the judgment of the District Court (R. 73). Petitioner has brought the case to this court upon certiorari granted October 9th, 1933.

The evidence shows that on December 11, 1927, Marcus and Ellanore Andlauer, husband and wife, while riding in their automobile, were struck by one of respondent's trains at a railway crossing near St. Marys, Kansas, and sustained injuries which resulted in their death. At the place where the accident occurred, respondent's railway track ran east and west. Located to the south of the railway track and running parallel thereto was a highway known as "U. S. No. 40," from which the view to respondent's track was clear and unobstructed for at least three-quarters of a mile. St. Mary's College is located north of the railway track, and entrance to it from the highway is provided by means of a cross-highway extending from Highway No. 40 north into the college grounds and crossing the railway track at right angles.

A plat offered in evidence (R. 30) shows that the distance from the north edge of Highway No. 40 to the south rail of the track is 71½ feet. Seventeen feet south of the south rail and at the east edge of the cross-high-

way is a standard railway crossing sign. The area surrounding the scene of the accident is flat, open country (see Deft.'s Ex. "C," R. 36B) and the contour of the ground is such that the occupant of any vehicle upon either the cross-highway or U. S. Highway No. 40 would have a clear and unobstructed view of railroad trains approaching from the east for a distance of more than 2,000 feet (R. 34).

On the day of the accident the Andlauers were traveling west on Highway No. 40 in a closed automobile. Intending to visit their son, a student at St. Mary's College, they turned north upon the cross-highway and were struck at the crossing by a westbound passenger train operated by respondent, and almost instantly killed. The accident occurred on Sunday afternoon, at about 3:30 o'clock. The day was clear, cold and dry (R. 57).

The only eye-witness to the accident was Arthur Nagle. He was in an automobile traveling west on Highway No. 40, and was about 200 feet east of the Andlauer car when the collision occurred (R. 54). He testified on direct examination that the Andlauer car slowed up to make the turn and then proceeded at a speed of not more than 15 nor less than 10 miles per hour (R. 54) to the point where the collision occurred. The witness testified that his attention was first attracted to the train as it passed him about 500 feet east of the crossing. On cross-examination he testified that the train was somewhat ahead of him and that he was about 500 feet from the crossing when the Andlauer car made the turn into the cross-highway, and that the train was traveling 55 to 60 miles per hour and the Andlauer car about 12 miles per hour (R. 56, 57).

The amended petition is drawn in two counts, the first charging negligence causing the death of Marcus And-

lauer, and the second charging negligence causing the death of Ellanore Andlauer. Identical charges of negligence are made in each count. It is charged that the respondent was negligent in operating the train at a high and dangerous rate of speed; in failing to warn after respondent knew, or could have known, that the decedents were in a position of peril; in failing to slow or stop the train after the peril arose; in failing to slow the train while passing the college and entering the city of St. Marys; and in failing to sound a whistle or ring a bell within eighty rods of the crossing (R. 9, 10). The answer is a denial of the allegations of negligence and a plea of contributory negligence (R. 17, 18).

At the close of petitioner's evidence the trial court ruled that the decedents were guilty of contributory negligence as a matter of law. While no express ruling was made upon respondent's requests (R. 62) for peremptory instructions in the nature of demurrers to the evidence, the court sustained respondent's motion in the alternative for a directed verdict or for a dismissal of the cause (R. 62), and entered an order dismissing the cause with prejudice (R. 63).

Upon appeal, the Circuit Court of Appeals held that it was unnecessary to consider the issue of primary negligence (R. 67, 68); that Marcus Andlauer, the driver of the car, was guilty of contributory negligence as a matter of law because the undisputed facts show violation of his duty to stop, look and listen before driving into the path of the approaching train (R. 68); that Ellanore Andlauer was also guilty of contributory negligence as a matter of law, not upon the principle that the negligence of the driver should be imputed to her, but because she, independently of the driver, was charged by law with the duty to keep a lookout at rail-

way crossings and to give timely and effective warning to the driver (R. 68); that petitioner is not entitled to the benefit of any presumption that Ellanore Andlauer exercised due care, because the physical facts overcome the presumption and establish her negligence (R. 69, 70); that the doctrine of discovered peril (the last chance rule) cannot be invoked, first, because the train crew would have been warranted in assuming an intention on the part of petitioner's decedents to stop (R. 71) and, second, because there was no evidence that the train crew did, in fact, discover the alleged peril (R. 71); that the alleged error of the trial court in dismissing the case with prejudice rather than directing and requiring the jury to return a verdict for the respondent is purely technical, could not possibly have prejudiced the petitioner, and was waived because the exceptions saved at the trial did not call the attention of the trial court to the specific error alleged (R. 72, 73).

The issues presented upon this writ of certiorari involve consideration of the contributory negligence of both decedents; the claim of petitioner that the case is a proper one for the application of the last chance rule; and the claim that the alleged technical error of the trial court in dismissing the case rather than directing a verdict was preserved for review, was prejudicial to the petitioner, and violated his rights under the Seventh Amendment to the Constitution of the United States.

SUMMARY OF THE ARGUMENT.

I.

Marcus Andlauer was guilty of contributory negligence as a matter of law.

The accident occurred in broad daylight, at a crossing familiar to him, and where he had a view of the approaching train for a distance of more than 2,000 feet. It was his duty to look, listen and yield the right-of-way to the train.

Baltimore & Ohio R. R. Co. v. *Goodman,* 275 U. S. 66.
Railroad v. *Houston,* 95 U. S. 697.
Bradley v. *Mo. Pac. Ry. Co.,* 288 Fed. 484, 487.

II.

Ellanore Andlauer was also guilty of contributory negligence as a matter of law.

It was her affirmative duty to maintain a lookout for approaching trains, and to give timely and effective warning of danger to her husband; and this she failed to do.

Bradley v. *Mo. Pac. Ry. Co.,* 288 Fed. 484 (C. C. A. 8).
Chicago & E. I. Ry. Co. v. *Sellars,* (C. C. A. 8) 5 Fed. (2nd) 31.
Kutchma v. *Railway Co.,* (C. C. A. 8) 23 Fed. (2nd) 183.
Parramore v. *Railroad,* (C. C. A. 8) 5 Fed. (2nd) 912.
Noble v. *Railway,* (C. C. A. 8) 298 Fed. 381.

Atchison, T. & S. F. Ry. Co. v. *McNulty,* (C. C. A. 8) 285 Fed. 97.

Davis v. *C. R. I. & P. R. Co.,* (C. C. A. 8) 159 Fed. 10.

Phillips v. *Davis,* (C. C. A. 3) 3 Fed. (2nd) 798.

Hall v. *Railway Co.,* (C. C. A. 3) 244 Fed. 104.

Brommer v. *Railway Co.,* (C. C. A. 3) 179 Fed. 577, 581.

Phila. & R. Ry. Co. v. *LeBarr,* (C. C. A. 3) 265 Fed. 129.

Southern Ry. Co. v. *Priester,* (C. C. A. 4) 289 Fed. 945, 949.

Pennington v. *Southern Ry. Co.,* (C. C. A. 5) 61 Fed. (2nd) 399.

Fluckey v. *Southern Ry. Co.,* (C. C. A. 6) 242 Fed. 468.

Summers v. *Denver Tramway Co.,* (C. C. A. 10) 43 Fed. (2nd) 286.

Garrett v. *Pennsylvania R. Co.,* (C. C. A. 7) 47 Fed. (2nd) 10.

Little v. *Hackett,* 116 U. S. 366.

III.

Respondent cannot be held liable under the last chance doctrine.

A. The Andlauers were not shown to be oblivious to danger until it was too late to warn them, and the train crew had a right to assume that they would not go into the path of the approaching train.

Illinois Central Ry. Co. v. *Ackerman,* (C. C. A. 8) 144 Fed. 959.

Toledo, St. L. & W. R. R. Co. v. *Allen,* 276 U. S. 165, 173.

B. If Ellanore Andlauer warned her husband, there was no duty on the part of the train crew, under the last chance theory, to warn her, and upon that theory her death was brought about solely by the negligence of her husband in failing to heed the warning, and not by the negligence, under the last chance rule, of the respondent.

IV.

There is no merit to petitioner's contention that his rights under the Seventh Amendment to the Constitution were violated by the action of the trial court in dismissing the case with prejudice rather than directing a verdict in favor of respondent.

A. The exceptions saved by petitioner did not direct the attention of the trial court to the claim that a dismissal would constitute denial of the right of trial by jury, and therefore the point was not saved for review.

United States v. *U. S. Fidelity Co.*, 236 U. S. 512, 529.
Fillippon v. *Albion Vein Slate Co.*, 250 U. S. 76, 82.
Guerini Stone Co. v. *Carlin Construction Co.*, 248 U. S. 334, 348.
Beaver v. *Taylor*, 93 U. S. 46, 55.
Robinson & Co. v. *Belt*, 187 U. S. 41, 50.
Harvey v. *Tyler*, 2 Wall. 328, 339.
Beckwith v. *Bean*, 98 U. S. 266, 284.
Mouler v. *American Ins. Co.*, 111 U. S. 335, 337.
Bowman v. *Railroad*, 184 Fed. 697 (C. C. A. 8).

B. If it be conceded that the trial court's action was erroneous, and was properly preserved for review, the alleged error was one that did not affect the substantial rights of petitioner, and, under the statute, does not justify reversal of the cause.

40 Stat. at L. 1181 (Tit. 28, Sec. 391, U. S. C. A.).
Gasoline Products Co. v. *Champlin Co.*, 283 U. S. 494, 499.
Coughran v. *Bigelow*, 164 U. S. 301, 307.
Central Transportation Co. v. *Pullman's Car Co.*, 139 U. S. 24, 39.
Oscanyan v. *Arms Co.*, 103 U. S. 261, 264.
Herron v. *Southern Pacific Co.*, 283 U. S. 91.
Bohenik v. *Delaware & Hudson Co.*, 49 Fed. (2nd) 722, 724 (C. C. A. 2) (certiorari denied, 284 U. S. 643).

ARGUMENT.

I.

Marcus Andlauer was guilty of contributory negligence as a matter of law.

So far as Marcus Andlauer is concerned, this record presents but another tragic instance of the driver of an automobile running a losing race with death at a railway crossing. The accident occurred in broad daylight, in open, level country. Andlauer knew the crossing. He had a view of the track for a distance of more than 2,000 feet to the east. It was his plain duty to look before he crossed and to yield the right of way to the approaching train. He either failed to look, or he took the chance of crossing in safety. In either event the law is well settled that no negligence of the railroad company, either in failing to warn or otherwise, will give rise to a submissible jury issue.

Mr. Justice Holmes, in the case of *Baltimore & Ohio R. R. Co.* v. *Goodman*, 275 U. S. 66, under facts far more favorable to the plaintiff than the facts presented in the present record, declared (l. c. 69):

> "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. Under such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further

precaution, he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true, as said in *Flannelly* v. *Delaware & Hudson Co.*, 225 U. S. 597, 603, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts."

Again, in *Railroad* v. *Houston*, 95 U. S. 697, Mr. Justice Field, dealing with a record where a pedestrian was killed while walking across the track at a place where a train could have been seen for a distance of three-quarters of a mile, reversed a judgment for the plaintiff, declaring that the trial court should have sustained a motion for a directed verdict. In the opinion (l. c. 702) it is stated:

"The failure of the engineer to sound the whistle or ring the bell, if such were the facts, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be

cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant."

The Circuit Court of Appeals for the Eighth Circuit, in the case of *Bradley* v. *Missouri Pacific R. R. Co.*, 288 Fed. 484, in an opinion by the late Judge Kenyon, and upon facts similar with those in the case at bar, thus expresses the rule (l. c. 486, 487):

"The only reasonable inference that can be drawn from their conduct is that they did not look, or if they did and saw the train, deliberately took the chance of beating it over the crossing. If the former, they were guilty of gross negligence—if the latter, gross recklessness. If parties driving automobiles persist in gambling with death at railroad crossings, their estates should not be augmented by damages if death win. Care, not chance, is the requisite at railroad crossings."

Under the undisputed facts, with a clear and unobstructed view in broad daylight, it cannot be disputed that had Marcus Andlauer looked even after he had turned into the cross-highway, he could have seen the approaching train in ample time to have stopped his automobile and thus have avoided the collision. If he looked and saw and took the chance of beating the train

over the crossing he was guilty of "gross recklessness." If he failed to look then his negligence in failing so to do bars recovery. Upon either theory Andlauer stands convicted of such contributory negligence as a matter of law as bars his recovery and, therefore, the action of the trial court in taking the case from the jury was proper.

II.

Ellanore Andlauer was also guilty of contributory negligence as a matter of law.

Ellanore Andlauer, the wife, was also a traveler upon the highway. She was charged with the positive duty of exercising due care for her own safety. Her contributory negligence does not arise upon any theory that the negligence of her husband must be imputed to her. Independently of his negligence the law imposed upon her the positive duty to make use of her senses of sight and hearing—to maintain a lookout for approaching trains, and to warn her husband of danger at a time when such warning would be effective. It is upon the theory that the evidence conclusively shows her violation of that positive duty, that both the trial court and the Court of Appeals held, as a matter of law, that she was guilty of contributory negligence.

The Court of Appeals, in affirming the judgment as to Ellanore Andlauer, supported its decision by a long line of authority, citing cases largely from the Eighth Circuit. Chief among them is *Bradley* v. *Mo. Pac. Ry. Co.*, 288 Fed. 484. The facts in that case are almost identical with those in the case at bar.

There the court holds that Bradley, a guest in the automobile, "is conclusively shown by the record to have been guilty of contributory negligence," because of his failure to give timely and effective warning to Brown, the driver. The late Judge Kenyon, in writing that opinion, calls to its support a wealth of authority from both state and national courts, and decides (l. c. 495)

> "The duty was upon him in approaching this crossing to ascertain the approach of a train by exercising his faculties of sight and hearing at such a place and within such distance from the crossing as would be effective. He could not rely upon Brown to protect him. The duty to look was as much upon him as upon Brown. There is no partition in the usual Ford car separating the front and rear seats; no reason why he could not have warned Brown in time to stop. If he failed to look where he could effectively see, he was guilty of negligence. If, seeing, he failed to warn Brown, he was equally guilty of negligence, and the negligence of the railroad company would not excuse him. While the railroad company is under legal obligation to give warnings at crossings, parties cannot rely thereon and fail to exercise their own faculties for protection. * * * Here the hazard was brought about as much by Bradley's negligence as by Brown's. We think the question of contributory negligence here was one of law for the Court, as the evidence relating thereto was undisputed and but one conclusion can be drawn therefrom by reasonable minds, and that is that Bradley was guilty of contributory negligence, and the Court would have been justified in so holding as a matter of law. *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, 417; *Union Pacific Railway Co.* v. *McDonald*, 152 U. S. 262, 283; *Railroad Co.* v. *Houston*, 95 U. S. 697; *Baltimore & Ohio R. R. Co.* v. *Griffith*, 159 U. S. 603; *Dernberger* v. *Baltimore & O. R. Co.*, 243 Fed. 21."

The Bradley decision has been adhered to, not only in the Eighth Circuit, but in many other Circuits. It would burden this brief unduly to discuss the facts of the numerous cases. A few of those from the Eighth Circuit are:

Chicago & E. I. Ry. Co. v. *Sellars*, 5 Fed. (2nd) 31.
Kutchma v. *Railway Co.*, 23 Fed. (2nd) 183.
Parramore v. *Railroad*, 5 Fed. (2nd) 912.
Noble v. *Railway*, 298 Fed. 381.
Atchison, T. & S. F. Ry. Co. v. *McNulty*, 285 Fed. 97.

The cases from the Third Circuit adhere to the same rule:

Phillips v. *Davis*, 3 Fed. (2nd) 798.
Hall v. *Railway Co.*, 244 Fed. 104.
Brommer v. *Railway Co.*, 179 Fed. 577, 581.
Philadelphia & R. Co. v. *LeBarr*, 265 Fed. 129.

The Fourth Circuit, in following the rule, cite for authority the Brommer case (*supra*) and others, as illustrated by:

Southern Ry. Co. v. *Priester*, 289 Fed. 945, 949.

The latest decision in the Fifth Circuit upon the subject is *Pennington* v. *Southern Ry. Co.*, 61 Fed. (2nd) 399, where the court cites the Bradley case and the case of *Garrett* v. *Pennsylvania Ry. Co.*, (C. C. A. 7) 47 Fed. (2nd) 10, in support of the principle here being considered.

The only decision we have found from the Sixth Circuit is the case of *Fluckey* v. *Southern Ry. Co.*, 242 Fed. 468,

where, although the precise point here considered is not directly involved, the court cites the Brommer case in support of the duty of the traveler to stop, look and listen.

The Tenth Circuit, in the case of *Summers* v. *Denver Tramway Co.*, 43 Fed. (2nd) 286, holds that the guest in an automobile who neglects to maintain a lookout and to warn the driver, is guilty of contributory negligence, and in support of its conclusion cites not only the Bradley case, but also the Brommer, LeBarr, Noble, Priester, Sellars, and Parramore cases (*supra*) and the older case (from the Eighth Circuit) of *Davis* v. *Chicago, R. I. & P. R. Co.*, 159 Fed. 10.

The First and Second Circuits, so far as we are informed, have not yet considered the point.

It will thus be seen that the overwhelming weight of authority as announced by the various Circuit Courts of Appeal in the decisions referred to, abundantly supports the Eighth Circuit rule that the guest in an automobile is to be regarded as any other traveler upon the highway, and is charged with the positive duty of maintaining a lookout at railway crossings, and of warning the driver of the approach of a train.

The Petitioner here, under Point V of his brief, complains that the rule of the Eighth and other circuits is in conflict with the rule as announced by the Circuit Courts of Appeal for the Seventh Circuit in one case and in the Ninth Circuit in the other case.

From the Seventh Circuit he cites the case of *Railway Co.* v. *Divine*, 39 Fed. (2nd) 537. The facts in the Divine case distinguish it from the case at bar, and from the facts existent in all of the other cases to which we have referred. The question there involved was whether or not a wife, riding on the front seat of an automobile with

her husband, was under a duty to maintain a lookout and to warn *when the evidence showed that her attention was directed to the care of her children.* The Kutchma, Priester and Noble cases (*supra*) are cited with approval in support of the general rule; but (l. c. 539) it is pointed out that:

> But, again, *this depends upon the facts of the particular case.* Here was this woman, riding beside her husband on the front seat of a Ford car, *holding on her lap her 3 year old child. On the back seat were three other of their children of tender years.* The husband was an experienced driver, and nothing appears why she might not safely intrust him with that task. To one knowing about children it must at once be plain that this mother, specially charged, as no doubt she was, with their care on this journey, *was quite exclusively occupied with that duty.* The care of the one on her lap would doubtless have been quite sufficient to engage her attention; but, when this is supplemented by the care of three more young ones on the back seat, it seems quite evident that it would leave little, if any, opportunity for her to indulge in 'back seat driving.' This situation itself cries out against charging her with contributory negligence in failing to keep a lookout for places of danger." (Italics ours.)

The Divine case, therefore, cannot be said to be in conflict with the rule announced in the Bradley case and followed by so many other decisions. There is no evidence in the case at bar which could possibly bring it within the exception to the general rule applied in the Divine case.

The Seventh Circuit does not entertain views that are out of harmony with the general rule. This is illustrated by the later case of *Garrett* v. *Pennsylvania R. Co.*, 47

Fed. (2nd) 10, in which the Seventh Circuit cites and follows the Bradley case in holding that the occupant of the back seat of an automobile, driven by her mother, and killed at a railway crossing under circumstances quite similar to those in the case at bar, owed the affirmative duty to look and to warn, and that her neglect of that duty is contributory negligence that defeats recovery for her death. There is, therefore, no possible conflict between the opinion of the Eighth Circuit in the case at bar and the holding of the Seventh Circuit in the Divine case.

We come now to the decisions from the Ninth Circuit, with which petitioner claims the decision here is in conflict.

The first is *Southern Pacific Co.* v. *Wright,* 248 Fed. 261. The opinion was written by District Judge Dietrich. Circuit Judge Hunt wrote a vigorous dissenting opinion which points out the obvious weakness of the majority opinion, and its utter lack of harmony with the prevailing general rule followed in the cases from the other circuits referred to, *supra.*

The Wright case recognizes the *principle* that the guest in an automobile is under a positive duty to exercise due care. It differs from the Bradley decision and others *only* upon the question of *what is to be done* by the guest to free him from a charge of contributory negligence. The majority opinion holds that it is the duty of the guest to *remain silent,* because, reasons the court (l. c. 264):

> "Any other course is fraught with danger. Interference by laying hold of an operating lever, or by exclamation, or even by direction or inquiry, is generally to be deprecated; in the long run, the greater safety lies in letting the driver alone."

Assuming the soundness of the court's conclusion thus expressed, the rule of silence has always been limited to those cases where an unexpected emergency arises (see the Bradley case, l. c. 495). It certainly has no application in the case at bar. Here there was no emergency shown. Here, Mrs. Andlauer knew, from the time she left Topeka, that she was to cross this track; and it was her duty, both before and after the car turned into the cross-highway, to ascertain if a train was approaching. Absent evidence showing unusual circumstances upon which the rule in the Wright case could be invoked, that case clearly gives the petitioner no support.

The next decision cited by petitioner is *Trenholm* v. *Railway Co.*, 8 Fed. (2nd) 452. That case is distinguished from the case at bar because in that case Miss Trenholm did, in fact, warn her father, the driver, by exclaiming, "Oh, Daddy, there's the train!" and because her age was such as to suggest that reasonable minds might differ as to her responsibility to watch and to warn. The trial court (4 Fed. [2nd] 562) followed the Bradley case in sustaining a demurrer. The Court of Appeals, in reversing the District Court, held that the question of her contributory negligence was for the jury. The opinion concludes:

> "Considering, then, *the age of the deceased, her position in the car,* the fact that the car was driven by her father, the fact that she had no notice that he was either incompetent or reckless, and *all the surrounding circumstances,* we have little hesitation in saying that the *question* of her contributory negligence was one of fact for the jury." (l. c. 455; italics ours.)

Thus it is evident that the court decided the Trenholm case upon the particular circumstances of the evidence before it. There are no such distinguishing or peculiar circumstances in the case at bar. But, if the ruling in the Trenholm case is as petitioner contends, then it is in conflict with the decisions in all of the other circuits; which express the sounder rule.

The last case relied upon by petitioner is the Ninth Circuit decision of *Southern Pacific Co.* v. *Stephens*, 24 Fed. (2nd) 182. The Stephens case cannot be considered upon the question because the state of the record is not shown in the opinion. It is not shown that Stephens warned, or that he had opportunity to warn. The "surrounding circumstances" are not stated. The opinion merely cites the Wright case and holds that the question of Stephens's contributory negligence was for the jury.

When analysis is made of the peculiar facts there involved, we can see nothing in these three decisions from the Ninth Circuit seriously conflicting with the views expressed in all of the other circuits in the cases cited. If this court regards them as conflicting, then we have no hesitancy in urging that this court should approve the majority rule.

The majority rule is thoroughly sound. It recognizes and enforces the duty of the traveler upon the highway to observe the movements of trains at railway crossings and to exercise a reasonable degree of care for his own safety. It enforces the duty of every traveler to know that it is impossible to stop the train, but easy to stop the automobile.

These principles have been thoroughly established by this court, as applied to the driver, in a long line of decisions of which the Goodman case (*supra*) is a leading

example. They should also be applied to the other occupants of motor vehicles. Except in those cases where the occupant is in the position of a passenger for hire (see *Little* v. *Hackett*, 116 U. S. 366), the public welfare and the safety of the traveler upon the highway demands that the guest maintain a lookout, and that he warn when warning would be effective. No other rule will operate to limit the ever mounting casualties that occur from automobile accidents. The rule of silence is limited to those cases where the emergency is sudden, and a warning might prove to be disconcerting.

The Court of Appeals, therefore, was right in ruling that the record in this case conclusively convicts Ellanore Andlauer of contributory negligence as a matter of law.

III.

Respondent cannot be held liable under the last chance doctrine.

There is no room in this record for the application of the last chance doctrine. From the moment the automobile turned into the cross-highway, it was traveling at a speed of only 12 miles per hour (R. 57), while the train was approaching at the rate of from 55 to 60 miles per hour. The train, traveling at a speed approximately 5 times greater than that of the automobile, is thus conclusively shown to have been only 357.5 feet from the crossing at the time the automobile turned into the cross-highway, a distance of 71.5 feet from the crossing. The evidence, however, shows that it was impossible to stop the train within less than 500 to 1,000 feet (R. 59).

Therefore, it cannot be said that the train could have *stopped* before reaching the crossing.

Petitioner's argument, however, is that, although the train could not stop, a warning could have been given. To that argument there are two conclusive answers.

In the first place, until the automobile reached a point on the cross-highway where it was apparent, either that it could not thereafter stop before going into the path of the on-coming train, or that its occupants were oblivious to their danger, there was no duty, under the last chance doctrine, to warn them. This is true because, absent something to indicate obliviousness, the train crew had the right to assume that the travelers would exercise ordinary care for their own safety and would not heedlessly drive into danger.

Under the record here, there is neither pleading nor proof of obliviousness. No fact appears from which it may be said that the approaching car exhibited any appearance of the obliviousness of its occupants.

Petitioner, without *evidence* of obliviousness, and without even having *alleged* it in his amended petition, now seeks to torture respondent's answer into an *admission* of their obliviousness to danger. The answer, however, is not susceptible of that construction. There it is only pleaded that the Andlauers failed to look—not that there was anything in their actions which brought home to the engineer the fact that they were oblivious to danger. The answer alleges only the facts as they appeared to the pleader *after* the event, not as they appeared to the *train crew before* the accident occurred.

Absent, therefore, either pleading or proof of obliviousness, the train crew had the right to assume that the automobile would stop. When it finally became apparent that they would not stop, it was then too late for a

warning to save them; because a warning at *that* time would come only at a time when they had reached the point of *actual danger*, the point where they themselves could not stop.

These views are well supported by authority. In the case of *Illinois Central Railroad Co.* v. *Ackerman*, 144 Fed. 959, the exact situation here presented arose. Ackerman drove upon a railway track in broad daylight, at a point where he could have seen the approaching train as easily as the train crew could have seen him. It was there argued that the train crew owed him a duty, under the last chance rule, to warn him. The opinion was written by Judge Hook, and was concurred in by Mr. Justice Van DeVanter, then a member of the court in Eighth Circuit. The court, denying recovery under that theory, holds (l. c. 961, 962):

> "The men upon the train were not obliged under the circumstances to *anticipate* his negligence. They could very well have assumed either that *he knew of the approach of the cars and intended to stop* at the customary safe distance or that he would look when near the track and then stop before going upon it. They did not know that he was inattentive and absent minded, nor did they know of his purpose to continue his onward course. *He was not in a place of danger until it was too late to prevent the accident.* The negligence of the employees of the railroad company and that of the deceased were concurrent and continuous down to the very moment of the collision and there is no room for the contention that the negligence of the latter should be regarded as a *known condition* upon which the negligence of the former subsequently operated." (Italics ours.)

This court entirely agrees with the decision in the Ackerman case, and adheres to the rule that, unless there be *knowledge of obliviousness* brought home to the train crew by some act or condition from which it should be realized that obliviousness does in fact exist, the last chance rule does not apply. In *Toledo, St. L. & W. R. R. Co.* v. *Allen*, 276 U. S. 165, 173, this court cites the Ackerman decision with approval, and rules:

> "There is nothing to sustain a finding that plaintiff was in any danger other than such as is usually incident to his employment or that any member of the train crew *knew or had any reason to believe that he was oblivious of the situation.* *Illinois Central Railroad Co.* v. *Ackerman*, 144 Fed. 959, 962. In the absence of knowledge on their part that he was in a place where he was liable to be struck *and oblivious of that danger*, they were not required to vary the switching practice customarily followed in that yard or to *warn or to take other steps to protect him.* There is no evidence to sustain the allegation that the other employees saw, or negligently failed to discover, plaintiff in a 'position of peril and *oblivious thereof.*' There was no foundation for a finding in favor of the plaintiff on that issue." (Italics ours.)

In the case at bar it cannot be said that there was any evidence to show that, even if the Andlauers were oblivious to danger after they turned into the cross-highway, their obliviousness was apparent to or should have been discovered by the train crew. Consequently, they owed no duty, under the last chance rule, to warn until it became apparent that the automobile did not intend to stop—and then it was too late to warn. Such a record

does not make a case for the jury under the last chance rule.

In the second place, if Ellanor Andlauer did in fact see and warn her husband, there was no necessity for further warning from the train crew. Upon that theory, her death was brought about solely by her husband's failure to heed the warning. The respondent did not contribute to *his* negligence in that respect, because, after the automobile turned into the cross-highway, all that was left for the train crew to do was to warn—and warning had already been given by the wife.

Upon either of the two theories mentioned, therefore, the last chance doctrine does not apply. The Court of Appeals properly so decided. The first reason given in its opinion (R. 70, 71), to the effect that the train crew had the right to assume that the automobile would stop, sufficiently disposes of the point now raised.

That being true, we are not concerned with the further holding of the Court of Appeals that, because actual knowledge of the train crew was not shown, the last chance rule does not apply. Hence we shall not indulge in discussion of the merits of that interesting but wholly immaterial question. We submit petitioner's contention is without merit.

IV.

There is no merit to petitioner's contention that his rights under the Seventh Amendment to the Constitution were violated by the action of the trial court in dismissing the case with prejudice rather than directing a verdict in favor of respondent.

The record discloses that, at the close of petitioner's evidence, respondent requested peremptory instructions in the nature of demurrers as to each count of the petition (R. 62) and then moved the court in the alternative to direct a verdict for the respondent or dismiss the case upon the merits with prejudice (R. 62). The trial court then reviewed the law questions raised by the demurrers, discussed the Can case (*U. S. Can Co.* v. *Ryan,* 39 Fed. [2d] 445, 8 C. C. A.) and the Bradley case (*Bradley* v. *Mo. Pac. Ry. Co.,* 288 Fed. 484, 8 C. C. A.) and sustained respondent's motion. The order entered upon that ruling was one of dismissal with prejudice.

The only exceptions saved by the petitioner were:

> "And the plaintiff then and there excepted to the ruling of the court in sustaining the defendant's motion in the alternative and in dismissing the petition and causes of action, respectively, set forth in counts one and two of the petition, with prejudice, and in entering a judgment dismissing the said cause, with such prejudice, and for costs against the said plaintiff, *for the reason that under the pleadings and the evidence the plaintiff was entitled to recover and was entitled to have the cause submitted to the jury* upon count one and also upon count two of the plaintiff's petition and the said exceptions were taken severally and to the action of the court upon each count of the plaintiff's petition." (R. 63, 64; italics ours.)

Upon this record the plaintiff insists that he was denied the right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States. For two reasons, the point is without merit.

A.

The exceptions saved by petitioner did not direct the attention of the trial court to the claim that a dismissal would constitute denial of the right of trial by jury, and therefore the point was not preserved for review.

The exceptions taken by petitioner were not directed to the *form* of the ruling. The reason assigned was one applicable only to the substantive question of whether or not a submissible issue had been tendered by the evidence. There was nothing in the exception to challenge the attention of the trial court to the Seventh Amendment. It was not even intimated that petitioner was complaining because the court did not go through the formality of requiring the jury to return a verdict. Had the question been raised, opportunity would have been afforded, then and there, to require a formal verdict; and thus obviate a mistrial.

In harmony with a long line of decisions by this court, the Circuit Court of Appeals properly held (R. 72, 73) that, even if a technical error had been committed, the absence of a specific exception prevented consideration of the question, thus raised for the first time in the court of review. The opinion comments:

> "The rule is a just one and affords an opportunity, both to the trial court and opposing counsel, to correct the error, which in the instant case goes only to matters of form." (R. 73.)

This court has repeatedly held that an exception, to preserve a point for consideration, must call attention to the precise point relied upon for reversal. Thus, in *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 529, Mr. Justice Pitney, speaking for the court, said:

> "The primary and essential function of an exception is to direct the mind of the trial judge to a single and *precise point* in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials, due to inadvertent errors, may thus be obviated. An exception, therefore, *furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court. Beaver* v. *Taylor*, 93 U. S. 46, 55; *Robinson & Co.* v. *Belt*, 187 U. S. 41, 50; *Addis* v. *Rushmore*, 74 N. J. L. 649, 651; *Holt* v. *United Security Life Ins. Co.*, 76 N. J. L. 585, 593. And the practice respecting exceptions in the federal courts in unaffected by the Conformity Act, Sec. 914, Rev. Stat. *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 553; *St. Clair* v. *United States*, 154 U. S. 134, 153." (Italics ours.)

Again, in the case of *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82, the court, in calling attention to the fact that the appellant was not accorded an opportunity to present its exceptions at the trial, states:

> "To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials, due to inadvertent errors, may thus be obviated.

United States v. *U. S. Fidelity Co.*, 236 U. S. 512, 529; *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334, 348."

So, also, in *Beaver* v. *Taylor*, 93 U. S. 46, 55, the court ruled:

> "One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so (citing authority). An exception in the form we are considering it entirely defeats that object."

And in *Robinson & Co.* v. *Belt*, 187 U. S. 41, 50, Mr. Justice Brown comments:

> "While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record."

In many other cases the same principle has been declared. A number of them have been collected in our summary of the argument.

Applying that principle to the case at bar, it will readily be seen that the exceptions here went only to the substantive question involved, and did not direct the attention of the trial court to the fact that the supposed error lay in the *form* of the order by which the court

terminated the case. Had it been suggested that a dismissal, rather than a directed verdict, would deprive plaintiff of a jury trial, all possibility of error could and would have been avoided by directing a verdict.

B.

If it be conceded that the trial court's action was erroneous, and was properly preserved for review, the alleged error was one that did not affect the substantial rights of petitioner, and under the statute, does not justify reversal of the cause.

If it be conceded that the trial court committed error in dismissing the case with prejudice rather than directing a verdict, and if it be conceded that the specific error thus committed was called to the attention of the trial court by proper exception, nevertheless the error is not one which would justify this court in reversing the case. The Congress, in 1919, added an amendment to Title 28, Sec. 391, U. S. C. A. (40 Stat. 1181), as follows:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

It is inconceivable that the supposed error in the instant case could have affected the substantial rights of the plaintiff. The error committed relates only to a matter of form or procedure and not to a matter of substance. Consequently, the point, even if preserved, is not one that would justify reversal.

This court has repeatedly held that the rights guaranteed by the Seventh Amendment are rights founded upon substance and not on form. In the recent case of *Gasoline Products Co.* v. *Champlin Co.*, 283 U. S. 494, 498, it is said:

> "It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. See *Herron* v. *Southern Pacific Co.*, *ante*, p. 91 (283 U. S. 91). Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure. See *Walker* v. *Southern Pacific R. Co.*, 165 U. S. 593, 596."

And in the Walker case, cited *supra*, the court (l. c. 596) declared:

> "The Seventh Amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. *Its aim is not to preserve mere matters of form and procedure, but substance of right.* This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative. So long as this substance of right is preserved, the procedure by which this result shall be reached is wholly within the discretion of the legislature, and courts may not set aside any legislative provision in this respect because the form or action—the mere manner in which questions are submitted—is different from

that which obtained at the common law." (Italics ours.)

This court has always held that a trial court does not violate the Seventh Amendment by deciding that the evidence tenders no issue of fact.

Coughran v. *Bigelow*, 164 U. S. 301, 307;
Central Transportation Co. v. *Pullman's Car Co.*, 139 U. S. 24, 39;
Oscanyan v. *Arms Co.*, 103 U. S. 261, 264;
Herron v. *Southern Pacific Co.*, 283 U. S. 91.

When once it is recognized that the only substantive right guaranteed by the Seventh Amendment is the right to have *controverted issues* of fact decided by a jury, then all questions which might arise as to the method by which the trial court carries into effect his decision that the case presents no issues of fact, are questions of form or procedure with which the Seventh Amendment is not concerned.

It is true that at common law a party could not be subjected to non-suit against his will. It is not true that compulsory non-suit violates the Seventh Amendment. In those states where, by statute, compulsory non-suit is adopted as a part of the state practice, the federal courts, under the Conformity Act, follow the same practice. See *Central Transportation Co. v. Pullman's Car Co., supra.* If compulsory non-suit is violative of any substantive right guaranteed by the Seventh Amendment, then state legislation, followed by reason of the Conformity Act, as illustrated by the Central Transportation case, overrides the Constitution.

Since the right to take a case from the jury exists in a proper case, notwithstanding the Seventh Amendment,

then the manner of taking the case from the jury is a purely formal or procedural matter with which the Seventh Amendment is not concerned. This point has been ably discussed by Judge Augustus N. Hand for the Circuit Court of Appeals, Second Circuit, in the case of *Bohenik* v. *Delaware & Hudson Co.*, 49 Fed. (2d) 722, 724 (certiorari denied 284 U. S. 643). We quote from that opinion:

> "There is no question that, if Judge Thacher had directed a verdict instead of dismissing the complaint and ordering a non-suit, the effect of his decision could not have been doubted. All the New York statute does is to make a dismissal at the close of plaintiff's case the equivalent in effect of a directed verdict if the record contains no statement that dismissal was not on the merits. This, in our opinion, does not interfere with the right of trial by jury. Here a trial with a jury was held, but the plaintiff's evidence was insufficient to establish her case. The defendant might have requested and obtained the direction of a verdict in its favor. Instead of that, the court ordered a judgment which, under the New York statute, is given the same effect as the direction of a verdict which the defendant might have required. *To raise a mere mode of procedure into a substantive right and to hold that the state statute cannot furnish the equivalent of a directed verdict though the effect upon the parties would be the same seems to us to place form above substance.* It would be quite different to direct judgment *non obstante veredicto* where decision on a motion for judgment made during the trial had not been reserved. That was in substance what was done by the Circuit Court of Appeals in the Slocum case and is not what was done here. The Supreme Court has sustained the practice of granting compulsory non-suits authorized by state statutes. *Cough-*

ran v. *Bigelow*, 164 U. S. 301, 17 S. Ct. 117, 41 L. Ed. 442; *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 11 S. Ct. 478, 35 L. Ed. 55. It is but a short step from this to treat such nonsuits like directed verdicts both in cases where the judge has in terms dismissed 'on the merits' and in cases where he has dismissed generally, but the statute has given his acts the same effect.

"The Seventh Amendment does not require that old forms of procedure must be retained where the substantial rights of the parties are in fact preserved. *In re Peterson*, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919. We think that the Constitution does not stand in the way of the application of Section 482 of the New York Civil Practice Act to trials in the United States courts." (Italics ours.)

The decision of this court in *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, does not at all conflict with the views so ably expressed by Judge Hand. In the Slocum case the defendant moved for a directed verdict but that motion was overruled and *the case was submitted to the jury*. Thereafter, following state practice, the defendant moved for judgment *non obstante veredicto*. That motion also was denied. On appeal the Circuit Court of Appeals determined that the motion for a directed verdict should have been sustained, and that the case should be remanded with directions to enter judgment for defendant, notwithstanding the verdict. This court held that such action was a re-examination of issues of fact which had once been submitted to the jury and thus violated the Seventh Amendment which commands that:

"No fact *tried* by a jury shall be otherwise *re*-examined in any court of the United States than according to the rules of the common law." (Italics ours.)

The opinion in the Slocum case was written in 1912. Since then, and in 1919, the Congress has provided that the appellate courts may not reverse except for those errors which affect the substantial rights of the parties. Since the Seventh Amendment is concerned with substance and not with form, it follows that the form of the ruling of the trial court could not possibly have affected the substantial rights of the plaintiff, and that the point now raised is purely technical and an attempt to raise a mere mode of procedure into a substantive right.

The federal statute of jeofaile (40 U. S. Stat. at L. 1181, Tit. 28, Sec. 391, U. S. C. A., quoted *supra*) is of comparatively recent origin. Similar state statutes, however, have long been in existence, and the state courts have uniformly applied them to situations identical with that presented by this record. In 4 C. J. 1171, the rule is thus announced:

> "It is held, generally *under statute*, that where the judgment was right on the merits, it will not be reversed for technical error in *dismissing the complaint*, in withdrawing the case from the jury, in directing a verdict, or in not submitting the case, or certain questions involved therein to the jury." (Italics ours.)

A similar question arose in Missouri, and the court in *Hall* v. *Small*, 178 Mo. 629, 634, applied the statute of jeofaile as follows:

> "The answer stated no defense whatever, and the court properly excluded the evidence offered in support of the answer. The court *erred*, however, in holding that the case was in equity, and *in discharging the jury*. The petition stated a cause of action

in ejectment. The answer attempted to set up an equitable defense, but it was not a cross-bill in equity asking affirmative relief. The case remained, therefore, an action at law. But *that ruling of the court does not constitute reversible error, under the statute.* Sec. 865, R. S. 1899 (now Sec. 1062, R. S. Mo. 1929, the Missouri statute of jeofaile, identical in substance with the Congressional statute now being considered). For no defense being pleaded or proved the plaintiff was entitled upon the pleadings to a peremptory instruction to the jury to find for her, and the judgment, therefore, is for *the right party, and therefore it is affirmed.*" (Italics and parenthetical insert ours.)

So, also, in *Barrett* v. *Shipley,* 206 Pac. 430, 431, the Supreme Court of Montana, under the same statute, ruled:

"It is contended, further, that the court erred in directing a verdict, and that the proper practice should have been to grant a non-suit or dismiss the complaint, in conformity with the provisions of subdivision 5, Sec. 9317, R. C. M. 1921. Speaking with technical precision, this contention is well founded. A motion for a directed verdict is, in legal effect, a demurrer to the evidence (*McIntyre* v. *Northern Pacific Railway Co.,* 56 Mont. 43, 180 Pac. 971), and, since there was not any evidence before the court, the proceeding was irregular; but a cause will not be reversed for a mere technical error which does not affect the substantial rights of the party complaining (Section 9191, R. C. M. 1921). Plaintiff was not injured by the irregularity, for he is not placed in a worse position than he would have been if the court had observed strictly the provisions of Section 9317 above."

To the same effect are the cases cited in the text and notes of 4 C. J. 1171, *supra*.

As before stated, the Seventh Amendment is concerned with matters of substance, and not of mere form of procedure. The Seventh Amendment does not protect the petitioner as against a directed verdict; and, since the respondent was entitled to a directed verdict, the mere form or mode of procedure by which judgment was rendered for respondent could not possibly have affected the "substantial rights" of the petitioner. Under the statute, therefore, the alleged error is harmless and does not justify reversal.

It would be a gross miscarriage of justice to require respondent to submit to another trial for the mere purpose of having the trial court sustain a motion for a directed verdict. The Seventh Amendment contemplates no such result; and the statute forbids it.

Conclusion.

This case was fairly tried, and the result reached, both in the trial court and in the Court of Appeals, was manifestly right. In its final analysis, the record is but another illustration of a losing race with death at a railroad crossing—a race run in broad daylight, in the open country, and with an unobstructed view, for over two thousand feet, of an oncoming passenger train.

> "If parties driving automobiles persist in gambling with death at railroad crossings, their estates should not be augmented by damages if death wins."

We respectfully submit that the decision below should be affirmed.

C. A. Magaw,
I. N. Watson,
Henry N. Ess,
Paul V. Barnett,
Charles V. Garnett,
Attorneys for Respondent.

In the Supreme Court of the United States

October Term, 1933.

No. 51.

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, *Petitioner,*

vs.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

RESPONDENT'S SUPPLEMENTAL BRIEF.

Preliminary Statement.

At page 25 of petitioner's brief it is urged that the liability for the death of a guest in an automobile is always a question for the jury, and in support of that argument petitioner cites certain decisions from New York.

The briefs of both parties disclose that only the matter covered by the first eighteen pages of petitioner's brief had been submitted to counsel for respondent at the time respondent's brief went to press (see respond-

ent's brief, page 1; petitioner's brief, pages 18 and 19). Therefore, because respondent has had no opportunity to reply to the point, counsel have asked and obtained leave of court to file this supplemental brief. It will be confined to the question of whether or not the record shows that Ellanore Andlauer was guilty of contributory negligence as a matter of law, as that question may be affected by the general rule of law which imposes upon the defendant the duty of pleading and proving contributory negligence.

ARGUMENT.

I.

The record conclusively shows, either that Ellanore Andlauer was guilty of contributory negligence as a matter of law, or that the alleged negligence of defendant was not the proximate cause of her death. In either event defendant was entitled to have the case taken from the jury.

The evidence conclusively shows that both the husband and wife were in good health and in full possession of their faculties, with normal eyesight and normal hearing (R. 51-52). Mrs. Andlauer was 35 years of age, and it may be inferred that her husband was near that age. There were, therefore, no peculiar circumstances, such as defective sight or hearing, or other physical disabilities, which might serve to distinguish petitioner's decedents from any other travelers upon the highway.

The accident occurred in broad daylight, at 3:30 o'clock in the afternoon of a dry, clear day. The crossing in question is over a single track railroad, was familiar to decedents, is located in the open country, not surrounded by obstructions to view, and the oncoming train was visible for a distance of more than 2,000 feet (R. 34).

A disinterested witness, Arthur Nagle, testified that he was an eye-witness to the actual collision and all of the events immediately preceding it. From his testimony it appears that at the time the automobile turned into the cross-highway, the train was less than 500 feet away (R. 56, 57); that the Andlauer car slowed down to a speed of approximately 12 miles per hour in making the turn (R. 57); and that it then continued *at that speed* until it reached the point where the collision occurred.

From Nagle's testimony it also appears that the train was traveling at a speed approximately five times greater than the speed of the automobile. The distance from the turn to the railway track is established by actual survey at 71½ feet (R. 31). Thus it appears that when the automobile was making the turn, the train was only 357.5 feet distant from the crossing. The speed of the automobile did not thereafter vary. Therefore, when the automobile was 20 feet from the crossing, still with ample time to stop, the train was only 100 feet away. Obviously, the Andlauers had ample opportunity to avoid the accident by stopping their car before they drove into the path of the oncoming train. These facts, clearly established by the record, are entirely undisputed. If they show, either that the wife was negligent, or that the alleged negligence of defendant was not the proximate cause of her death, there can be no recovery.

These facts clearly and affirmatively show, so far as the wife is concerned, that one of three things *must* have happened:

1. She failed to maintain the lookout which the law required of her and did not know of the approach of the train until it was too late; or

2. She saw the approach of the train but failed in her duty to warn her husband of danger at a time and at a point upon the highway where such a warning would have been effective; or

3. She saw the train and warned her husband, but he did not heed the warning.

These are the only three possibilities presented by the record. While it may not be said with certainty which of the three events actually occurred, *it must be said with certainty that one of these three possibilities did,*

in fact, occur. Therefore, if no liability is imposed upon the defendant upon any of these three hypotheses, the trial court was right in taking the case from the jury. We shall therefore consider them in the order presented:

1. If the first of these three possibilities represents the actual event, then the wife was negligent in failing to maintain a lookout for approaching trains and falls under the condemnation so often expressed by this court and many others of travelers upon the highway who fail to make use of their faculties at railway crossings. Under that hypothesis it is obvious that she was guilty of contributory negligence as a matter of law.

2. It is equally true that if she saw the train and failed to warn her husband at a time when such warning would have been effective, then in that event also she was guilty of contributory negligence as a matter of law. It is her duty, not only to look, but also to give effective warning. Mere observance of the train is not enough. It is the communication of the fact of danger that the law requires of her. That communication must come at a time when it would be effective. She was not only under the duty of maintaining a lookout; she was also under the duty of warning her husband of danger *in time* to give him ample opportunity to stop the car before reaching the railway track. Upon that hypothesis, therefore, she is guilty of contributory negligence as a matter of law.

3. If she looked, saw and warned her husband at a time when warning would have been effective, then it is true that she is exonerated from the charge of contributory negligence; but *it is also true that the primary negligence of defendant was not, in any sense, the proximate cause of her death.* The actionable primary

negligence charged is a failure to warn these travelers of the approaching train. If she looked and saw, then she did not need the warning. No matter how grossly negligent the defendant may have been in failing to give such a warning, if the driver of the Andlauer car knew of the approach of the train, then whistle or bell would not have added to the knowledge he already possessed, and the sole proximate cause of the death of Ellanore Andlauer is the negligence of her husband in driving into the path of a train which he knew was approaching at high rate of speed. While the primary negligence of defendant under those circumstances may exist, that primary negligence was not the proximate cause of the wife's death. It takes not only negligence, but negligence that causes *damage* to create a cause of action. The negligence of the railroad company under the facts now assumed did not cause the death of the wife. Her death was caused solely by the negligence of her husband in failing to heed her warning and in driving into the path of a train which he knew, by reason of that warning, was approaching.

The federal courts have uniformly held that where the evidence of the plaintiff conclusively shows contributory negligence, it is the duty of the trial court to direct a verdict.

Southern Pacific Co. v. *Pool*, 160 U. S. 438, 440, and cases cited therein.
Garrett v. *Railroad*, (C. C. A. 7) 47 Fed. (2d) 10, 14.
Woolworth Co. v. *Davis*, (C. C. A. 10) 41 Fed. (2d) 342, 347.

For example, in the Goodman case (*Baltimore & Ohio* v. *Goodman*, 275 U. S. 66), Goodman was killed and

there was no evidence *offered by defendant* to support the plea that he was guilty of contributory negligence. Nevertheless, the facts and the presumptions to be drawn therefrom did sustain the burden of proof upon that issue and this court held that Goodman was guilty of contributory negligence as a matter of law.

Again, in the Houston case (*Railroad Co.* v. *Houston*, 95 U. S. 697), there was no direct testimony to prove that the plaintiff either looked or did not look; and yet this court held that the trial court would not have erred had it directed a verdict for defendant.

It is therefore clear that the federal rule as to the burden of proof of contributory negligence only requires that the evidence, even though offered by the plaintiff, and all of the presumptions and inferences that might possibly be drawn therefrom, convict the plaintiff of contributory negligence. If that be true, then defendant has sustained the burden of proof and is entitled to a directed verdict.

If the case had been submitted to a jury it could only have decided that one of these three events occurred; and, no matter which it was, it would not have justified recovery for the wife's death. The trial court's ruling was therefore the only ruling that could be made, regardless of the theory adopted.

II.

The New York decisions relied upon by petitioner are not out of harmony with these views.

Petitioner argues (petitioner's brief, p. 25) that in every case involving death of the guest the rule respecting the burden of proof makes it incumbent upon the

court to submit the case to the jury. In support of that argument he relies chiefly upon the decision of Mr. Justice Cardozo, who, while a member of the New York bench, wrote the opinion in *Baker* v. *Railroad*, 248 N. Y, 131. The court there dealt with fact complications not even remotely present in the case at bar. By the opinion it is shown:

> "A network of tracks covers the crossing *to the peril of the traveler and his possible confusion.* As one looks to the east, there is first a New York Central roadbed. This consists of *four* tracks; the Lehigh Valley train was running on one of them. Beyond is the roadbed of the Erie with separate tracks and trains. A flagman, hired by the Erie and Central jointly, has his station in this open space. His duty is to flag the trains on all the lines to the east and to the west. * * * The flagman stood with his back to the approaching travelers, the signal disc in his hand. Apparently he was giving warning of the danger on the Erie track, or *so a traveler might infer.* When the Erie engine had gone by, the flagman turned about. He was then facing Vardon's car approaching at the other side. From the main or river-road to the most westerly rail the space was only thirty feet. Perceiving the approaching car, the flagman walked along the open space and pointed to the wheels. Vardon applied the brakes and brought the car to a standstill; it is possible he might better have gone on." (l. c. 134; italics ours.)

From the foregoing it is apparent that Baker's driver, Vardon, brought his car to a stop at what he understood to be the direction of the flagman. Upon the facts of the Baker case, it is apparent that the court there ruled the issue of contributory negligence of the guest as one

of fact for the jury *because* of the intricate circumstances and conditions at the crossing and the possible confusion of the travelers as a result thereof. It is not shown that Baker had any opportunity to warn at a time when warning would have been effective. Consequently, the court properly rules that a warning might have been disconcerting.

The New York courts do not undertake to say that Section 265 of the Practice Act requires the submission of the issue of contributory negligence to the jury in *every* death case. That act does nothing more than adopt in New York the rule which always has been recognized by the federal courts.

It will be noted that petitioner cites the later case of *Schrader* v. *N. Y. C. & St. L. Railway Co.*, 254 N. Y. 148, and quotes from that opinion at page 35 of his brief. He fails to call attention to the fact that there the New York court held, notwithstanding the statute, that the traveler was guilty of contributory negligence as a matter of law. In that case the court holds:

> "The burden of proof of contributory negligence in death cases is and has been since September 1, 1913 (*Sackheim* v. *Pigeron*, 215 N. Y. 62) upon the defendant. (Civ. Prac. Act., Sec. 265.) The question is ordinarily one for the jury (*Chamberlain* v. *Railroad*, 238 N. Y. 233) *but not invariably* (*Castle* v. *Director General of Railroads*, 232 N. Y. 430; *Allen* v. *Railroad*, 244 N. Y. 542). The change in the rule as to the burden of proof is not a change in the substantive law and does not alter the measure or duty of proper care. If it does not appear whether or not the deceased exercised proper care when approaching the crossing, or if the proofs are equally balanced, the defendant fails to bear the burden of proof upon it. Such is the substance of the stat-

utory change in the common law rule. Except for the shifting of the burden of proof, the rule is the same as in cases of personal injury, not resulting in death.

"As a person approaches a railroad crossing in a vehicle, he must reduce his speed to a limit which is reasonably safe under the circumstances and conditions and then proceed cautiously and carefully with the vehicle under complete control; and he must employ his senses of hearing and sight to avoid danger (*Horton* v. *Railroad Co.*, 237 N. Y. 38; *Fitch* v. *Railroad*, 233 N. Y. 356). * * * Our rule of conduct is not standardized, but it has been stated repeatedly, as in the Horton case, *supra*. *One who approaches any crossing, at any time or under any circumstances, without taking any precautions for his safety, is guilty of contributory negligence as a matter of law.*" (Italics ours.)

These and other cases are but illustrative of the principle that, although the proof of contributory negligence rests upon the defendant, nevertheless where the facts are not in dispute and those facts in and of themselves show the existence of contributory negligence, the case is for the court and not for the jury. In the case at bar the facts from which the conclusion of contributory negligence flows, are undisputed and affirmatively appear in the record from the testimony of an eye-witness. Under such circumstances the trial court's action was entirely proper.

Conclusion.

This is not a case where no eye-witness has testified concerning the facts. It is not a case where petitioner's decedents are found dead in the wreckage of an automobile caught upon the front of a fast-moving train, without explanation or testimony accounting for the wreck. On the contrary, direct and positive testimony was offered by petitioner, the testimony of an eye-witness who saw the scene enacted from a position scarcely 200 feet away, and who testified that the automobile, without increasing or decreasing its speed, drove from the main highway along the cross-highway and directly into the path of the oncoming train. This and the other positive testimony in the record which we have pointed out, thoroughly justifies the conclusion reached by the Circuit Court of Appeals in that portion of its opinion (R. 70), where it is said:

> "Here, the physical facts and surrounding circumstances, all practically undisputed, would seem conclusively to show that the occupants of this car, heedlessly, and without looking or listening, drove onto this crossing without any knowledge of the approach of the train. They knew that they were approaching the crossing; they knew exactly where they were and where the crossing was. They had an unobstructed view of the approaching train, *yet the car neither stopped, slackened its speed, increased its speed, nor turned to the right nor to the left, but went steadily forward. These physical facts and surrounding circumstances overcome all presumption as to the exercise of ordinary care, and conclusively establish that both the occupants of this car were guilty of contributory negligence.*" (Italics ours.)

Any other ruling would constitute the railroad company an *insurer* of every occupant (other than the driver) of every automobile when killed at a railway crossing. Unless the rule is that the court may, from the undisputed facts and circumstances brought into the record by the testimony of eye-witnesses, draw the irresistible conclusion that the guest failed in his duty to maintain a lookout for the approaching train and to give warning of its approach at a time and place when such warning would be effective, then every crossing case involving the death of a guest will be one where the railroad must certainly lose because not in a position to offer more cogent proof of contributory negligence. Unless the principles here considered be given the approval of this court, the consequences will be far-reaching indeed.

We therefore respectfully submit that, considered in the light of the general rules of law respecting the burden of proof, the case made was one for the court, and the trial court properly refused to submit it to the jury.

Respectfully submitted,

C. A. MAGAW,
I. N. WATSON,
HENRY N. ESS,
PAUL V. BARNETT,
CHARLES V. GARNETT,
Attorneys for Respondent.

FILE COPY

Office Supreme Court, U.
FILED
DEC 28 1933
CHARLES ELMORE CROPL
CLERK

In the Supreme Court of the United States

October Term, 1933.

No. 51.

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, deceased, *Petitioner*,

vs.

THE UNION PACIFIC RAILROAD COMPANY, *Respondent*.

RESPONDENT'S PETITION FOR REHEARING.

C. A. MAGAW,
I. N. WATSON,
HENRY N. ESS,
PAUL V. BARNETT,
CHARLES V. GARNETT,
Attorneys for Respondent.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

In the Supreme Court of the United States

October Term, 1933.

No. 51.

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, deceased, *Petitioner*,

vs.

THE UNION PACIFIC RAILROAD COMPANY, *Respondent*.

RESPONDENT'S PETITION FOR REHEARING.

PRELIMINARY STATEMENT.

The decision of the Court in this case, respecting the liability of respondent on the cause of action asserted by petitioner as to Ellanore Andlauer, deceased, is of far reaching importance to every railroad in the United States. It also vitally affects other parties in all cases where there may be involved questions decided by the Court in the case at bar. In its opinion this Court has disapproved decisions of long standing in the Eighth and other Circuit Courts of Appeal and has completely re-

nounced rules of law announced in such decisions regarding the duty of a guest or passenger in an automobile to warn the driver thereof of impending danger.

The ruling of the Court in this case is such that well recognized and long followed rules of law respecting the character of evidence necessary to sustain defendant's burden of proof of contributary negligence have been abrogated. Under the Court's ruling, a court in a case by a guest where all of the occupants of an automobile may have been killed would be powerless to take the case from the jury, even though the circumstances and physical facts may, under established principles, clearly convict the decedents of contributory negligence as a matter of law. The holding is such that the only showing required to tender a jury issue in actions for death of an automobile guest is proof of the accident, existence of primary negligence, and the death of the guest. Regardless of physical facts and circumstances which might be shown in such a case, this Court has held that the issue thus presented cannot be dealt with by a court, but only by a jury.

The Court's premise for its holding is that it is impossible for a court to lay down rules of conduct for a guest in such cases. Thus, this Court imposes upon railroads a burden more onerous than that imposed upon defendants in *res ipsa loquitur* cases, as in such cases, when facts appear, even though they be physical facts, which exonerate the defendant from negligence, the court is authorized to take the case from the jury. Under the holding of this Court, a jury submission would be required.

The decision of the Court is based upon the premise that respondent was guilty of primary negligence in operating the train at a negligent rate of speed and in

failing to warn. We will demonstrate that respondent was not negligent in either respect, and as a result Ellanore Andlauer's death was caused solely by her husband's negligence.

Modern transportation demands require the rendition of speedy and efficient transportation services. The Court is not dealing here with an operation in a thickly populated or congested area, but with a train being run over a flat, open country sparsely inhabited. In the light of that requirement and common knowledge that railroad trains do operate at high speeds, we believe the decision of the Court in this case, in holding that respondent is guilty of primary negligence in operating the train in question over a private crossing at a rate of speed of fifty to sixty miles per hour, not in violation of any statute, ordinance, regulation, custom or rule of the common law, overturns existing law announced by many courts in many cases and, for that reason, the decision in this case is of such vital concern to railroads in America that a reconsideration of the question in the light of the facts as shown by the record should be given.

The importance and revolutionary effect of the Court's decision must be conceded. Because of the vital concern of all the railroads operating in America with the decision of the question presented to the Court, this petition is respectfully filed with the hope that the Court will reconsider the case on a rehearing and permit reargument of the important questions involved.

PETITION FOR REHEARING.

Comes now respondent and prays the Court to vacate and set aside its opinion and judgment and grant it a rehearing of this cause upon the following grounds and for the following reasons, to-wit:

I.

Respondent does not stand convicted of primary negligence in operating its train at an excessive rate of speed, because:

(a) The petition does not charge violation of the speed ordinance of the city of St. Marys, Kansas, as the result of which the operation of the train in question beyond the city limits at a rate of speed in excess of that prescribed by said ordinance is not an issue tendered by the pleadings;

(b) The accident occurred beyond the borders of the town of St. Marys, where the ordinance will not be given extraterritorial effect, from which it follows that respondent cannot be convicted of primary negligence for operating a train at the crossing in question at a rate of speed in excess of that fixed by said ordinance;

(c) There is no evidence in the record to show that either of the Andlauers had knowledge of any alleged custom of respondent to reduce the speed of its trains at the crossing in question;

(d) There is no statute or rule of common law in Kansas limiting the speed of trains over such crossing;

(e) It is a matter of common knowledge that railroads in order to render adequate transportation services must operate their trains at high speed and the operation of the train at the rate of speed here shown is not negligence as a matter of law.

Primary negligence must be predicated either upon a negligent rate of speed or failure to warn. In this division of the argument we will respectfully demonstrate that the Court's conclusion that respondent was guilty of operating the train in question at a negligent rate of speed is not well founded either upon the record or upon well established principles of law heretofore de-

clared by the courts. From the Court's accurate description of the crossing in question it appears that decedents' view of the railroad track and approaching train was unobstructed for at least 2,000 feet. The train was traveling through the flat, open country of Kansas, in broad daylight, on a clear day. There was only one track at the place of the accident. It is shown by the record that there were no other travelers or persons upon or near this crossing at the time of the accident, except the witness' Nagle, who was in a car approximately 400 feet behind the Andlauers. In fact, it was no different from any of the many other crossings in the rural sections of the state. The place of the accident was far removed from congested areas, even the city of St. Marys being only a small town having between 1,130 and 1,500 inhabitants (R. 53, 58). In order that respondent may render adequate transportation service upon the transcontinental railroad in question, it is necessary that operations be conducted at high rates of speed, and the inhabitants of the country are charged with knowledge of such practice. We will attempt to show that the Court's conclusion that the train was being operated at a negligent rate of speed at the time and place in question is not well founded. Each of the arguments in support of our contention will be separately stated and argued in this division. The alleged failure to warn is separately treated in other divisions of this petition.

(a) The petition does not charge violation of the speed ordinance of the city of St. Marys, Kansas, as the result of which the operation of the train in question beyond the city limits at a rate of speed in excess of that prescribed by said ordinance is not an issue tendered by the pleadings.

When the speed ordinance of the city of St. Marys was offered in evidence, respondent objected to its introduction upon the ground that it was not pleaded and not competent for any purpose (R. 60). The amended petition on which the case was tried pleads negligence in the operation of the train at an excessive rate of speed (R. 9) and in the violation of a custom to slow down its train when passing the college (R. 10). It does not plead violation of the ordinance introduced in evidence; nor does it plead that the speed of the train was excessive because it violated the provisions of the ordinance. In this state of the record no issue was properly tendered by the pleadings as to whether or not the violation of the city ordinance constituted negligence. Therefore, under no conceivable theory, could the rates of speed fixed by the ordinance be used for determining whether the rate of speed at which the train was operating was negligent. The petition does not attempt to charge that the operation of the train at a speed of from fifty to sixty miles per hour at the crossing was negligent because of the existence of the ordinance and the duty of the engineer to slow down his train to such a speed that he would not exceed the limits prescribed by such ordinance upon entering the town. On the other hand, petitioner founded his charge of a negligent rate of speed upon the alleged operation of the train at a speed which he asserts is negligent in the light of common law rules and upon an alleged custom of respondent to slow down its trains at the crossing. The fact that the court admitted the

ordinance in evidence does not render that ordinance competent upon the issue here involved, because the manifest error of the trial court in admitting the ordinance could not be complained of in this proceeding at any time until this Court had handed down its decision.

We therefore respectfully submit that, in determining the question of the negligent operation of the train, it is not proper to extend the scope of the inquiry beyond the issues framed by the pleadings.

(b) The accident occurred beyond the borders of the town of St. Marys, where the ordinance will not be given extraterritorial effect, from which it follows that respondent cannot be convicted of primary negligence for operating a train at the crossing in question at a rate of speed in excess of that fixed by said ordinance.

The ordinance had no extraterritorial force. No power was vested in the city of St. Marys to control the acts of respondent committed beyond the territorial limits of that city. Petitioner's decedents could acquire no rights under that ordinance. Respondent owed them no duty under it. The record here shows, without dispute, that the place where the accident occurred is beyond the corporate limits of the town of St. Marys. Such being the case, it should be ruled here, as was held in *Illinois Central Railway Co.* v. *Davis,* (C. C. A. 6th) 32 Fed. (2d) 232, that municipal regulations intended to fix a standard of duty for railroad companies in operating trains have for their purpose only the protection of those within the municipality and not those outside of it. Therefore the operation of a train outside of the city at a speed in excess of the rates fixed by an ordinance, does not constitute negligence though it occur near a city.

In the Davis case, plaintiff's decedent was killed at a public crossing by a train approaching but just beyond

the corporate limits of the town of Trimble in the state of Tennessee. The statutes of Tennessee required such trains to give signals "at short intervals" while within one mile of such town and until they reached its station. Concerning the effect of this statute and its applicability to the case there being considered, the Court held (l. c. 233):

> "The provision was intended to fix a standard of duty for railroad companies in operating trains *in cities.* * * * The purpose, as we have said, of this provision of the statute * * * was *to protect those within the city and not those outside it.* Even, therefore, if there was a failure to comply with this statute *there was on that account no violation of duty to the decedent.* The liability *as to him* was determinable under the law applicable to the crossing where the accident occurred—the common law." (Italics ours.)

We therefore respectfully submit that respondent's operation of its train over the crossing in question at a speed in excess of that prescribed by the ordinance of the town of St. Marys is of no significance in determining whether such rate of speed was negligent, as the ordinance had no application beyond the territorial limits of the town, and therefore respondent's duty as to the speed of the train must be determined by application of law applicable to the crossing in question and not by the ordinance.

(c) There is no evidence in the record to show that either of the Andlauers had knowledge of any alleged custom of respondent to reduce the speed of its trains at the crossing in question.

The amended petition pleads that respondent negligently omitted to observe and follow a custom to slow down its trains when passing the college (R. 10). The only evidence offered by the petitioner in support of that allegation of the petition was the testimony of the witness Nagle. Over objection he testified (R. 55) that he had "at times" observed this train as it approached the crossing, and that "it usually slowed up" to about 25 or 30 miles an hour. The objection interposed was that this testimony was not competent because it was not shown that decedents had any knowledge of the alleged custom.

There is no evidence that Ellanore Andlauer had ever ridden the train in question or that she ever saw that or any other train approaching this crossing prior to the day of the accident. As to Ellanore Andlauer, there is a total failure of proof of knowledge of or reliance upon any custom to reduce the speed of the train at this crossing.

As to Marcus Andlauer, the witness William H. Miller testified that prior to 1927 Marcus Andlauer had been accustomed to use the train on his trips to St. Marys; that he bought an automobile in July of 1927, and after that purchase he had not used the train "so much" (R. 55).

The witness testified on cross-examination that he could only recall one specific instance where he had taken Marcus Andlauer to catch the train involved in this accident (R. 55). There is no evidence that any train ever ridden by Marcus Andlauer ever slowed down at the crossing.

In our view, the record as thus outlined cannot be said to prove knowledge of and reliance by decedents upon the custom. There is no evidence in the record showing that either of the Andlauers had ever heard of the speed ordinance of St. Marys. We, therefore, submit that there is no evidence of any knowledge by decedents of a custom of respondent to reduce the speed of the train in question.

If the alleged custom existed, there is no evidence to show knowledge of that custom by decedents or their reliance upon it. The law is well settled that before negligence can be based upon the violation of a custom, the party injured must have known of and relied upon that custom. Therefore, the alleged failure to reduce the speed of the train in accordance with the averred custom cannot be the basis of liability.

(d) There is no statute or rule of common law in Kansas limiting the speed of trains over such crossing.

There is no statute or court decision in the State of Kansas limiting the speed of trains over highway crossings.

The Supreme Court of Kansas in the case of *A. T. & S. F. Ry. Co.* v. *Schriver*, 80 Kan. 540, 103 Pac. 994, has defined the rights of railroad companies respecting the speed at which they may operate their trains over railroad crossings in the following language, l. c. 995:

> "It is now generally understood that an unusually high rate of speed is not of itself improper or negligent. In the open country, where no peculiar conditions exist which make it dangerous, and speed is not limited by statute, trains may be operated at any speed which the existing exigencies of public traffic seem to require. *A. T. & S. F. Co.* v. *Hague*, 54 Kan. 284, 38 Pac. 257."

This ruling was afterwards approved by the Supreme Court of Kansas in *Land* v. *St. Louis & S. F. R. Co.*, 95 Kan. 441, 148 Pac. 612, l. c. 614.

Therefore, liability in this case may not be predicated upon the fact that this train was operated over this crossing at a rate of speed negligent at common law or by statute.

(e) It is a matter of common knowledge that railroads in order to render adequate transportation services must operate their trains at high speed and the operation of the train at the rate of speed here shown is not negligence as a matter of law.

Modern transportation demands require rapid operation of trains. By reason of airplane and other competition, the demands of the public are for faster schedules than those now maintained by most railroads. Railroads are required to maintain schedules. If they are required to reduce the speed of their trains at every railroad crossing, schedules cannot be maintained. Travelers upon the highway well understand that they must stop for the train and not the train stop for them (*Balt. & Ohio* v. *Goodman*, 275 U. S. 66, 69). They do not expect the speed of the trains to be reduced merely because the railroad track intersects the highway.

It is common knowledge that the usual speed of transcontinental passenger trains, such as the one in question, is 60 miles per hour and more. The operation of the train in question at a speed of from 55 to 60 miles per hour through a flat, open Kansas prairie in broad daylight on a clear day, far removed from congested areas, cannot be said to be excessive. See *A. T. & S. F. Ry. Co.* v. *Schriver, supra.*

Judge Augustus N. Hand, speaking for the second circuit in the case of *Bassett* v. *Delaware & Hudson Co.*,

62 F. (2d) 74, 75, upon the question of whether or not the operation of a train over a crossing in the open country, but near a village, at a speed estimated to have been between 50 and 60 miles an hour was negligence, said (l. c. 75-76):

> "We think that the plaintiff *made no case based upon a negligent rate of speed of the train,* as it approached the crossing. There was no speed limit required by the laws of Vermont. The crossing was *beyond the confines* of the village of Fair Haven at a place where the view of the railroad track was unobstructed for a long distance and there were no circumstances which rendered the crossing peculiarly dangerous. Slowing down at such country crossings would make it impossible for railroads to maintain their time schedules and *has never been regarded as necessary.* Travelers must rely for security on their own vigilance and the sounding by the railroads of the signals required by law. They cannot require more protection. *Baltimore & Ohio R. Co.* v. *Reeves,* (C. C. A. 6) 10 F. (2d) 329; *Pennsylvania R. Co.* v. *Stegaman,* (C. C. A. 6) 22 F. (2d) 69; *Southern Pac. Co.* v. *Stephens,* (C. C. A. 9), 24 F. (2d) 182; *Strider* v. *Penn. R. R. Co.,* (C. C. A.) 60 F. (2d) 237; *Warner* v. *N. Y. Cent. R. R. Co.,* 44 N. Y. 465; *Mulvaney* v. *N. Y. Cent. R. Co.,* 233 Mich. 350, 206 N. W. 536; *Newhard* v. *P. R. R. Co.,* 153 Pa. 417, 26 A. 105, 19 L. R. A. 563; *Haller* v. *Penn. R. Co.,* 306 Pa. 98, 159 A. 10; *Henry* v. *Boston & Maine R. R.,* 125 Me. 366, 134 A. 193. In *Canadian Pacific Ry. Co.* v. *Slayton,* 29 F. (2d) 687, we held that the jury might find the rate of speed at a crossing negligent, but the place of collision was in a village." (Italics ours.)

Judge Hand also said at l. c. 76:

> "A speed of from 50 to 60 miles an hour at an ordinary crossing has not been held excessive. Moreover, even if we assume that there was some evidence of such a rate, it certainly was disputed and the defendant was entitled to the charge which it requested: 'That a rate of speed of even 40 to 50 miles over the crossing in question would not be any negligence.' The denial of this request was error."

Many of the facts in that case closely parallel the facts in the case at bar. There as here the train was proceeding through the open country at a speed estimated to have been between 50 and 60 miles per hour toward a highway crossing not "peculiarly dangerous." In that case as in this the train was approaching the village. In that case as in this the crossing was beyond the confines of, but near, the village. The opinion in the Bassett case does not state the population of the village there mentioned, but the town of St. Marys, Kansas, is no more than a village, containing a population of from eleven hundred thirty to fifteen hundred inhabitants.

The similarity of the facts in that case to the facts of this case bearing upon the question of excessive speed, render that case exactly in point. We, therefore, submit that the operation of the train over the crossing in question in the open country at a speed of from 50 to 60 miles per hour as required by the exigencies of service demands was not negligent as a matter of law, and there is no evidence in this record of the negligent operation of the train at excessive speed.

Primary negligence based upon excessive speed is not shown by the record in this case. On the contrary, the record shows that the speed at which the train was operated was, as a matter of law, not negligent. The opinion of the Court is based upon the premise that there was negligent speed, the opinion reciting (p. 5): "The negligence sought to be established against the railroad company was not only failure to sound the whistle, but operation of the train at a rate of speed dangerous and unusual." The Court then states that the negligence of the driver of the automobile was concurrent with the negligence of respondent in operating the train at a negligent speed or in failing to warn. We have shown that primary negligence cannot be based on speed, and will show that no proper predicate for negligence can be based on failure to warn. Therefore primary negligence of respondent is completely eliminated and it must be conceded that the sole proximate cause of the accident was the negligence of Marcus Andlauer and therefore there can be no liability on respondent.

It thus is apparent that the Court, in reaching the conclusion that the contributory negligence of the husband was not the sole proximate cause of the accident, treated the case as though negligence on the part of respondent in operating its train at excessive speed had been established and that therefore its negligence was concurrent with that of the husband.

If the Court upon re-examination of the record determines, as we think it must, that there is no evidence of excessive speed of the train, then affirmance of the judgment of the Circuit Court as to both decedents will follow.

II.

If it be assumed that Ellanore Andlauer warned her husband, then her death was occasioned solely by his negligence and not respondent's failure to warn.

We have already shown that the record affords no support for petitioner's claim of excessive speed as primary negligence. Thus, there remains for consideration only the question of whether or not failure to warn was a proximate or a concurrent cause of the death of the wife. Under this head we deal with that question upon the assumption that the wife did note the danger, warn her husband and urge him to stop.

It is a familiar principle of law that he who has knowledge of a fact cannot be injured by the failure of others to notify him of that fact. If it be assumed that the wife did, in fact, warn her husband at an effective point, then whistling for the crossing would not have further apprised him of the train's approach. The warning given by the wife fully informed him of the approach of the train.

In *Southern Pacific Co.* v. *Kauffman*, 50 F. (2d) 159, l. c. 166 (C. C. A. 9), the Court in a guest case said:

> "If the driver of the automobile saw the approaching train in time to stop, any negligence of the railway company in failing to give notice of the approach of the train would no longer be an operating cause for the injury."

Under these assumptions, respondent's failure to warn had nothing whatever to do with the collision, which was brought about solely by the husband's negligence in driving into the path of a train which he knew, from his wife's warning, was approaching. Respondent's

failure to sound its whistle was "no longer an operating cause for the injury."

Since, therefore, respondent's failure to warn was not the proximate cause and had nothing to do with bringing about the result, it cannot be said that failure to warn was a contributing cause or concurrent with the negligence of the husband.

III.

If it be assumed that the wife with knowledge of the train's approach remained silent upon the theory of reliance upon her husband to exercise ordinary care or the theory that her interference might disconcert him, then respondent's failure to warn was neither the proximate nor concurrent cause of the accident.

We deal now with the assumption that the wife, although knowing of the train's approach, remained silent, either in reliance upon her knowledge of the habits and character of her husband, trusting him to exercise ordinary care for her safety, or because she thought that her interference might disconcert him.

The Court says in its opinion that:

> "Whatever duty rested upon her (the wife) under the circumstances for aught that appears to the contrary may have been fully discharged. It properly cannot be said from anything shown by the record before us that she did not maintain a careful lookout for the train or that, if aware of its approach, she did not warn her husband or urge him to stop before entering upon the crossing. * * *"

If the Court is correct in this statement, then it is plain that the failure to sound the whistle did not

constitute the proximate cause because the whistle could have added nothing to the knowledge which each of the Andlauers possessed. The Court further says:

> "Or she may have seen the approaching train, observed that her husband was also aware of the fact and relying upon her knowledge of his habits and character trusted him with good reason until it became too late to interfere to do whatever was necessary to avoid the danger."

If this was the situation, then the sounding of the whistle could have added nothing to the knowledge they already possessed and the failure to so sound the whistle did not constitute actionable negligence.

It is plain that the accident was caused by the unfortunate error of judgment of the husband in attempting to cross the track in front of the train which both he and his wife could easily discern when they were in a place of safety and the train was approaching at a high rate of speed.

It is not apparent to us from the facts shown by the record how the wife could disconcert her husband by telling him that the train was coming. There is no more reason why this should disconcert him any more than the sounding of a whistle or the approach of the train. It was not a case where they were suddenly confronted with the train, for the train was in full view when they were 71 feet from the crossing, driving slightly upgrade and at such a rate of speed that the car could have been stopped almost instantly. Drivers of automobiles are often confronted with obstacles or dangers much more disconcerting than the situation presented by the record in this case.

Clearly, the failure to sound the whistle under the facts disclosed by the record of this case is not actionable. Ellanore Andlauer's death was caused solely by the negligence of Marcus Andlauer without any concurrent negligence of the respondent.

Conclusion.

The opinion of the Court in this case was founded upon the assumption that respondent was guilty of primary negligence in operating the train at a negligent rate of speed, or in negligently failing to give warning of its approach, or both. We have pointed out that the record gives no foundation for this assumption. In fact, a consideration of the record in this case leads us to no other conclusion than that the respondent was not guilty of primary negligence having any causal connection with the accident. In the absence of such primary negligence it makes no difference whether Ellanore Andlauer warned her husband of the approach of the train and urged him to stop the automobile or whether she remained silent thinking that the warning would be needless or fearing that it might disconcert him. In either state of facts, the sole cause of the accident was the negligence of Marcus Andlauer in driving the automobile into the path of the approaching train for which respondent cannot be held in any way accountable or responsible.

By reason of the great importance of the principles laid down by the Court in this case and their effect upon existing rules of law, and because of the assumption made by the Court respecting the negligence of respondent, we respectfully request that the Court set aside its opinion and decision, grant the respondent a

rehearing, and upon rehearing affirm the judgment of the Circuit Court of Appeals.

Respectfully submitted,

C. A. MAGAW,
I. N. WATSON,
HENRY N. ESS,
PAUL V. BARNETT,
CHARLES V. GARNETT,
Attorneys for Respondent.

Certificate of Counsel.

NOW COME C. A. Magaw, I. N. Watson, Henry N. Ess, Paul V. Barnett and Charles V. Garnett, counsel for the respondent in the above entitled cause, and certify that they and each of them have read and examined the foregoing petition for rehearing and know the contents thereof; that said petition for rehearing is presented to the Court on behalf of respondent in good faith and not for delay.

C. A. MAGAW,
I. N. WATSON,
HENRY N. ESS,
PAUL V. BARNETT,
CHARLES V. GARNETT.

SUPREME COURT OF THE UNITED STATES.

No. 51.—October Term, 1933.

William Miller, Administrator, of the Estates of Marcus Andlauer and Ellanore Andlauer, Petitioner,
vs.
Union Pacific Railroad Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 4, 1933.]

Mr. Justice Sutherland delivered the opinion of the Court.

In December, 1927, decedents, Marcus Andlauer and his wife Ellanore Andlauer, while attempting to cross respondent's railroad track at a highway intersection within a few feet of the easterly boundary line of the City of St. Marys, Kansas, were killed as the result of a collision between a train of respondent and the automobile in which they were riding. The wife sat in the front seat with her husband, who was driving. The automobile had been driven westerly along a highway parallel to the railroad track to a point about seventy-one feet south of the railroad track, where it was turned into a road running northerly across the track, and driven thence without change of speed at the rate of twelve or fifteen miles per hour until the accident. The day was clear. The crossing was a familiar one to decedents; and, from the point where the automobile was turned to a point beyond the crossing, trains from the east were in plain view for a distance of two thousand feet. The train which caused the accident came from the east at a speed of from fifty to sixty miles an hour. There was evidence that the whistle was not sounded; that the train was about an hour late; that it usually slowed down in approaching the crossing to about twenty-five or thirty miles per hour; and that a city ordinance limited the speed of trains within the city to twenty miles per hour. The rear wheels of the automobile were on or very near the south rail of the track when the collision occurred.

The trial court took the case from the jury and dismissed the petition on the merits with prejudice, holding that both decedents were guilty of contributory negligence as matter of law. This judgment the circuit court of appeals affirmed. 63 F. (2d) 574.

So far as the case for the death of the husband is concerned, we agree with the courts below. Contributory negligence on his part was clearly established under the general rule frequently stated by this court. We need do no more than refer to the case of *Northern Pacific Railroad* v. *Freeman*, 174 U. S. 379, where a person killed by a moving train at a railroad crossing well known to him, with the coming train in full view which he could have seen while forty feet distant from the track if he had looked, was held guilty of contributory negligence because, putting aside the oral testimony, these facts demonstrated that either he did not look or took the chance of crossing before the train reached him. "When it appears," the court said (pp. 383-384), "that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken. . . . Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence." Authority for this view was found especially in *Railroad Co.* v. *Houston*, 95 U. S. 697, 702.

The case for the death of the wife is controlled by different considerations. Although it was at one time ruled in England—*Thorogood* v. *Bryan*, 8 C. B. 115 (1849)—that the negligence of the driver of a vehicle is imputed to a passenger, that doctrine, much criticized and finally abandoned in England (*The Bernina*, 12 Pro. Div. 58), was never generally accepted in this country. Followed by a few state decisions, it was rejected by the great weight of American authority and, after full consideration, distinctly repudiated by this court. *Little* v. *Hackett*, 116 U. S. 366. And see *Union Pac. Ry.* v. *Lapsley*, 51 Fed. 174. Whether a passenger or guest in a public or private conveyance, having no control over its movement, may be denied a right of recovery for personal injury or death on the ground of contributory negli-

gence, depends upon his own failure to exercise a proper degree of care, and not upon that of the driver. This is true where the passenger is the wife of the driver as in other cases. *Chicago, R. I. & P. Ry Co.* v. *Fanning*, 42 F. (2d) 799, 803. And, while the state decisions are not uniform on the subject, the federal rule is definitely settled that the burden of proving such contributory negligence rests, in all cases, upon the defendant, *Railroad Company* v. *Gladmon*, 15 Wall. 401, 406-407; *Texas & Pacific Railway* v. *Volk*, 151 U. S. 73, 77-78; *Central Vermont Ry.* v. *White*, 238 U. S. 507, 512, although, if such negligence be established by plaintiff's evidence, it hardly seems necessary to add, defendant may have the benefit of it. *Washington & Georgetown R'd* v. *Harmon*, 147 U. S. 571, 580-581; *Indianapolis, etc. R. R. Co.* v. *Horst*, 93 U. S. 291, 298-299.

In the present case, as already appears, the burden was sustained as to the husband. It was not sustained as to the wife. As to her, there is an entire absence of evidence on the point. Whatever duty rested upon her under the circumstances, for aught that appears to the contrary, may have been fully discharged. It properly cannot be said from anything shown by the record before us that she did not maintain a careful lookout for the train, or that, if aware of its approach, she did not warn her husband or urge him to stop before entering upon the crossing. Want of due care for her own safety must be proved; it cannot be presumed. The presumption is the other way. *Texas & Pacific Railway Co.* v. *Gentry*, 163 U. S. 353, 366; *Baltimore & Potomac R. R.* v. *Landrigan*, 191 U. S. 461, 473-474; *A., T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351, 356. If, as here, there be no evidence which speaks one way or the other with respect to contributory negligence of the person killed, it is presumed that there was no such negligence. *Looney* v. *Metropolitan Railroad Co.*, 200 U. S. 480, 488.

Here the wife was not in control of the movement of the automobile. She could only note the danger, warn her husband, and urge him to stop. She may have done so, and he, misjudging the situation or taking the chance, have gone forward nevertheless. Or she may have seen the approaching train, observed that her husband was also aware of the fact and, relying upon her knowledge of his habits and character, trusted him, with good reason until it became too late to interfere, to do whatever was necessary

to avoid the danger. The applicable rule is found in *Southern Pac. Co.* v. *Wright*, 248 Fed. 261, 264. That was a case where one Wright was riding in a motor truck with an experienced chauffeur as driver. A collision occurred between the truck and a train, which resulted in Wright's death. It did not appear whether Wright saw the train before it was seen by the chauffeur. The court said that he might have seen it and yet reasonably remained silent on the assumption that, the view being unobstructed, the chauffeur also saw it and was governing himself accordingly. "So that up to the very time that the truck approached the main track he [Wright] may have reasonably supposed that Tucker [the chauffeur] would stop the car in time to avoid a collision. And when he realized that he was going to attempt to cross ahead of the train, what could, or should, he have done? Who can now say as a matter of law? Cry out? He might thus have confused and disconcerted the driver, and an instant of indecision in such a case may be fatal. Here, with the truck a half a second sooner or the train a half a second later, the tragedy would not have happened. It must be borne in mind that there was no time to reflect or reason. If the train was running only 30 miles an hour—the speed was probably greater—it was only about 30 seconds from the time it came into view a quarter of a mile away until it crashed into the truck." Accordingly, it was held that the question of Wright's contributory negligence was not one of law but one of fact for the jury.

To the same effect, see, *Chicago & E. I. Ry. Co.* v. *Divine*, 39 F. (2d) 537, 539; *Trenholm* v. *Southern Pac. Co.*, 8 F. (2d) 452; *Baker* v. *Lehigh Valley R. R. Co.*, 248 N. Y. 131, 135-136; *Nelson* v. *Nygren*, 259 N. Y. 71, 75; *Crough* v. *New York Central R. R. Co.*, 260 N. Y. 227, 232. In the *Baker* case, *supra*, the New York court, holding that the question of the contributory negligence of an automobile passenger killed in a train collision was for the jury and not the court, said:

"Believing the car was about to stop, he may have thought that warning would be needless, and discovering too late that the car was going on, he may have thought that interference would be dangerous. These and like possibilities were to be estimated by the triers of the facts. They make it impossible to deal with the issue as a question for the court."

Bradley v. *Missouri Pac. R. Co.*, 288 Fed. 484, is cited by respondent to the contrary; but to the extent that it conflicts with the view we have expressed, that case is disapproved.

But the argument is advanced that even though the railroad company be guilty of negligence and the wife be absolved from the charge of contributory negligence, nevertheless the railroad company is not liable, because, under the circumstances here disclosed, the proximate cause of the wife's death was not its negligence, but the negligence of the husband in driving upon the track in the face of the approaching train. The validity of this contention depends altogether upon whether the negligence of the husband constituted an intervening cause which had the effect of turning aside the course of events set in motion by the company, and in and of itself producing the actionable result. The evidence here does not present that situation. Instead of a remote cause and a separate intervening, self-sufficient, proximate cause, we have here concurrent acts, cooperating to produce the result. As this court pointed out in *Washington & Georgetown R'd* v. *Hickey*, 166 U. S. 521, 525, the vice of the argument consists in the attempt to separate into two distinct causes (remote and proximate) what in reality is but one continous cause—that is to say, an attempt to separate two inseparable negligent acts which, uniting to produce the result, constituted mutually contributing acts of negligence on the part of the railroad company and the driver of the automobile.

The negligence sought to be established against the railroad company was not only failure to sound the whistle, but operation of the train at a rate of speed dangerous and unusual, and which necessarily would bring the train into the city at a speed far beyond the limit prescribed by the city ordinance. Assuming, upon these facts, that a finding by the jury that the train was negligently operated would be justified, such negligence continued without interruption down to the moment of the accident. The same is equally true in respect of the contributory negligence of the driver of the automobile. The result, therefore, is that the contributory negligence of the driver did not interrupt the sequence of events set in motion by the negligence of the railroad company or insulate them from the accident, but concurred therewith so as to constitute in point of time and in effect what was essentially one transaction.

The rule is settled by innumerable authorities that if injury be caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone. "It is no defense for a wrongdoer that a third party shared the guilt of the same wrongful act, nor can he escape liability for the damages he has caused on the ground that the wrongful act of a third party contributed to the injury." *Choctaw, O. & G. R. Co.* v. *Holloway*; 114 Fed. 458, 461-462. See also *Grand Trunk Railway Co.* v. *Cummings*, 106 U. S. 700, 702; *Gila Valley R. R. Co.* v. *Lyon*, 203 U. S. 465, 473; *Union Pac. Ry. Co.* v. *Callaghan*, 56 Fed. 988, 993; *Chicago, R. I. & P. Ry. Co.* v. *Sutton*, 63 Fed. 394, 395; *Chicago, St. P. & K. C. Ry. Co.* v. *Chambers*, 68 Fed. 148, 153; *Shugart* v. *Atlanta, K. & N. Ry.*, 133 Fed. 505, 510-511; *Pacific Telephone & Telegraph Co.* v. *Hoffman*, 208 Fed. 221, 227; *Memphis Consol. Gas & Electric Co.* v. *Creighton*, 183 Fed. 552, 555.

The case last cited is peculiarly apposite. There the owner of a house, being unable to shut off the gas, telephoned the gas company asking that someone be sent to look after the matter. There being some delay, the owner, in attempting to find the leak, lighted a match which caused an explosion of accumulated gas. Creighton was injured thereby and brought suit against the gas company. That company insisted that the proximate cause of the injury was the act of the owner in bringing the lighted match in contact with the gas. The court in rejecting the claim said:

"This might be so if it had been a supervening cause which rendered the first cause inoperative. The truth of the matter is that the causes of the injury were concurrent. The accumulation of the gas was one; the lighted match was the other. The effect of the former had not ceased, but co-operated with that of the other in effecting the injury. In such case an inquiry about the proximate cause is not pertinent, for both are liable."

The court below erred in holding as matter of law that the wife was guilty of contributory negligence and, therefore, its judgment cannot stand.

Judgment reversed and cause remanded to the district court for further proceedings in conformity with this opinion.